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MAHOMEDAN LAW

AND

LAW RELATING TO PERSONS

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Selection of Leading Cases

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SELECTION OF LEADING CASES.

MAHOMEDAN LAW.

ABUL FATA MAHOMED ISHAK

v.

RUSSOMOY DHUR CHOWDHRY.[1]

[*Reported in L. R., 22 I. A. 76; I. L. R., 22 Calc., 619.*]

1894.
December 15.

The judgment of their Lordships was delivered by

Lord Hobhouse.—The object of this suit is to establish as a valid *wakfnama* a settlement of property effected by deed dated the 21st of December, 1868. The settlors were two brothers called Abdur Rahman and Abdool Kadir, Mahomedan gentlemen belonging to the Hanifa sect of the Sunnis. The plaintiffs, now appellants, are sons of Abdur Rahman, to whom interests are given by the settlement. The defendants, a hundred and more in number, are the settlors themselves, and persons claiming interests in portions of the settled property by virtue of transactions with Abdur Rahman subsequently to the date of the Settlement. Some of these claimants are respondents to the present appeal.

The Subordinate Judge of Sylhet held that the settlement was valid as a *wakfnama*, and gave the plaintiffs a decree on that footing. On appeal the High Court took a different view, and dismissed the suit. The great mass of the record relates to

[1] *Present*: Lord Watson, Lord Hobhouse, Lord Shand, and Sir Richard Couch.

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subordinate disputes—what parcels of property fall within the settlement, and what inferences are to be drawn from the way in which the settlors dealt with the property after the settlement. But the only question argued here has been the nature of the settlement itself; for in the view taken by their Lordships all others are immaterial.

The settlement begins thus: "Committing ourselves to the mercy and kindness of the Great God, and relying upon the bounty of Providence for the perpetuation of the names of our forefathers and for the preservation of our properties, we..... have made this permanent *wakf* according to our Mahomedan Law." Then they describe the property conveyed by them. The objects are:—

"For the benefit of our children, the children of our children and the members and relatives of our family and their descendants in male and female lines, and, in their absence, for the benefit of the poor and beggars and widows and orphans of Sylhet, on valid conditions and true declarations hereinafter set forth below, we, two brothers, have for our lifetime taken upon ourselves the management and supervision of the same in the capacity of *mutwalis*, and taken out the *wakf* properties from our ownership and enjoyment in a private capacity, and we have put them in our possession and under our control in our capacity as *mutwalis*."

Then are stated various incidents and duties attaching to the office of *mutwali*, amongst which occur the following:—

"In order to maintain the name and prestige of our family, we, the *mutwalis*, will make reasonable and suitable expenses according to our means and position in life. We will, at our own choice and discretion, fix allowances for the support and maintenance of the persons intended to be benefited by this *wakf*, who are now living or who may be born afterwards, and we will pay the same to them every month, and also the expenses for their festive and mourning ceremonies, when required.

"It will be competent for us, the *mutwalis*, and our successor *mutwalis*, to enhance or reduce the allowances of the persons for whose benefit the *wakf* is made, who are now living, or who may hereafter be born, in consideration of course of their position and circumstances and the state of the income of the *wakf* properties. It will be competent for us, the present *mutwalis*, and the

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v.
Russomoy Dhur Chowdhry.

mutwalis who will be appointed after us, to use the *wakf* properties as security and to grant *putni*, *dur-putni*, and permanent and temporary *ijara* settlements in respect of them, and with the money to be received as *salami* for the aforesaid settlements, to purchase some other properties, and to exchange any of the lands of this *wakf* with some other lands, and to include the lands so acquired by purchase or in exchange in the *wakf*, and to spend the profit of the same towards the expenses of the *wakf*, and to keep the surplus profit in stock in the *tehbil*, and to try always to increase the *wakf* properties and the amount in cash. Whatever properties may be acquired by us, the *mutwalis*, and our successor *mutwalis* after execution of this document, shall be included in this *wakf*. We the *mutwalis*, and the *mutwalis*, who will be appointed in our place hereafter, shall have no power to make gift of any property in favour of relatives or strangers."

It is provided that future *mutwalis* shall always be chosen from the male issue of the settlors, or if they fail, from their relatives. Provisions are made to prevent any of the persons for whose benefit the *wakf* is made from claiming anything as of right, and from calling for accounts, and from alienating his interest or subjecting it to attachment. And towards the end of the deed its object is again stated :—

"The object of this *wakf* of properties is that the properties may be protected against all risks, the name and the prestige of the family maintained, and the profits of these properties appropriated towards the maintenance of the name and prestige of the family, the support of the persons for whose benefit the *wakf* is made, and religious purposes, etc."

Such is the instrument which is propounded as a *wakfnama*. The motives stated are, regard for the family name, and preservation of the property in the family. Every specific trust is for some member of the family. The family is to be aggrandized by accumulations of surpluses, and apparently by absorption into the settlement of after-acquired properties; and no person is to have any right of calling the managers to account. These possessions are to be secured for ever for the enjoyment of the family, so far as the settlors could accomplish such a result, by provisions that nobody's share shall be alienated, or be attached for his debts. There is no reference to religion unless it be the invocation

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of the Deity to perpetuate the family name and to preserve their property, and the casual mention of unspecified religious purposes, etc., at the end of the sentence last quoted. There is a gift to the poor and to widows and orphans, but they are to take nothing, not even surplus income, until the total extinction of the blood of the settlors, whether lineal or collateral.

It seems that in the High Court, the learned Advocate-General contended for the plaintiffs that a gift to the donors' descendants without any mention of the poor might be supported as a *wakf*; and even that the Mahomedan Law intends that perpetual family settlements may be made in the name of religious trusts. In the case of *Ahsanulla Chowdhry* v. *Amarchand Kundu*,[1] this Board said: "They have not been referred to, nor can they find, any authority shewing that, according to Mahomedan law, a gift is good as a *wakf*, unless there is a substantial dedication of the property to charitable uses at some period of time or other." The Board proceeded to affirm the decision of the High Court of Calcutta, who held that a small part of the property had been well devoted to charity, but that as to the bulk of it, the settlement was, notwithstanding some expressions importing a *wakf*, in substance nothing but a family settlement in perpetuity, and as such, contrary to Mahomedan Law. The principle of this decision has been quoted and approved in a subsequent case, *Abdul Gafur* v. *Nizamuddin*.[2] This is a sufficient answer to the arguments used in the High Court.

Their Lordships, however, cannot now say that they have not been referred to any authority for the contrary opinion; for Mr. Branson has cited to them two cases in which there are very elaborate judgments delivered in the Calcutta High Court by the learned Judge, Mr. Ameer Ali. Those judgments are in accordance with the opinion expressed by him in his Tagore Lectures, and if their Lordships have rightly comprehended them, they do go the whole length of the Advocate General's argument. One is in the case of *Meer Mahomed Israil Khan* v. *Sashti Churn Ghose*,[3] where there were some immediate gifts to the poor, and the gift was upheld, and no further appeal was presented. The other case

[1] L. R., 17 I. A., 28 at p. 37; I. L. R., 17 Calc., 498 (509).

[2] L. R., 19 I. A., 170; I. L. R., 17 Bom., 1.

[3] I. L. R., 19 Calc., 412.

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is that of *Bikani Mia* v. *Shuk Lal Poddar*,[1] where there was no gift to the poor till after the failure of the settlor's family. It was heard by Full Bench of five Judges, who decided that the deed was invalid, Ameer Ali, J., dissenting.

The opinion of that learned Mahomedan lawyer is founded, as their Lordships understand it, upon texts of an abstract character, and upon precedents very imperfectly stated. For instance, he quotes a precept of the Prophet Mahomet himself, to the effect that "A pious offering to one's family, to provide against their getting into want, is more pious than giving alms to beggars. The most excellent of *sadakah* is that which a man bestows upon his family." And by way of precedent he refers to the gift of a house in *wakf* or *sadakah*, of which the revenues were to be received by the descendants of the donor Arkan.[2] His other old authorities are of the same kind.

As regards precedents, their Lordships ought to know a great deal more in detail about them before judging whether they would be applicable at all. They hear of the bare gift and its maintenance, but nothing about the circumstances of the property—except that in the case cited, the house seems to have been regarded with special reverence—or of the family, or of the donor. As regards precepts which are held up as the fundamental principles of Mahomedan Law, their Lordships are not forgetting how far law and religion are mixed up together in the Mahomedan communities; but they asked during the argument, how it comes about that by the general law of Islam, at least as known in India, simple gifts by a private person to remote unborn generations of descendants, successions that is of inalienable life interests, are forbidden; and whether it is to be taken that the very same dispositions, which are illegal when made by ordinary words of gift, became legal if only the settlor says that they are made as a *wakf*, in the name of God, or for the sake of the poor. To those questions no answer was given or attempted, nor can their Lordships see any. It is true that the donor's absolute interest in the property is curtailed and becomes a life interest; that is to say, the *wakfnama* makes him take as *mutwali* or manager. But he is in that position for

[1] I. L. R., 20 Calc., 116.

[2] I. L. R., 20 Calc., 140.

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life; he may spend the income at his will, and no one is to call him to account. That amount of change in the position of the ownership is exactly in accordance with a design to create a perpetuity in the family, and indeed, is necessary for the immediate accomplishment of such a design.

Among the very elaborate arguments and judgments reported in *Bikani Mia's* case,[1] some doubts are expressed whether cases of this kind are governed by Mahomedan Law; and it is suggested that the decision in *Ahsanulla Chowdhry's* case[2] displaced the Mahomedan Law in favour of English law. Clearly the Mahomedan Law ought to govern a purely Mahomedan disposition of property. Their Lordships have endeavoured to the best of their ability to ascertain and apply the Mahomedan Law, as known and administered in India; but they cannot find that it is in accordance with the absolute, and as it seems to them extravagant, application of abstract precepts taken from the mouth of the Prophet. Those precepts may be excellent in their proper application. They may, for aught their Lordships know, have had their effect in moulding the law and practice of *wakf*, as the learned Judge says they have. But it would be doing wrong to the great law-giver to suppose that he is thereby commending gifts for which the donor exercises no self-denial; in which he takes back with one hand what he appears to put away with the other; which are to form the centre of attraction for accumulations of income and further accessions of family property; which carefully protect so called managers from being called to account; which seek to give to the donors and their family the enjoyment of property free from all liability to creditors; and which do not seek the benefit of others beyond the use of empty words.

Mr. Branson indeed did not contend for such sweeping conclusions, though, as in duty bound, he submitted the arguments which lead up to them. But he argued that where, as in this case, there is an ultimate gift for the poor, a perpetual family settlement expressly made as *wakf* is legal. He had a right to argue that point as not being covered by the decision in *Ahsanulla Chowdhry's* case.[2] This Board expressly left it open, because

[1] I. L. R., 20 Calc., 116.

[2] L. R., 17 I. A., 28; I. L. R., 17 Calc., 498.

they found that contradictory views had been taken in India, and they did not desire to enter into that controversy in a case, where the facts did not raise it. The facts of this case do raise it.

Having examined the authorities cited, their Lordships find a great preponderance against the contentions of the appellants. Some authorities go so far as to hold that for a valid *wakf* the property should be solely dedicated to pious uses. On that point, however, this Board in *Ahsanulla Chowdhry's* case [1] adopted the opinion of Kemp, J., to the effect that provisions for the family out of the grantor's property may be consistent with the gift of it as *wakf*. In favour of the view now urged for the appellants there is the judicial opinion of Ameer Ali, J., in *Bikani Mia's* case,[2] dissenting from the rest of the Court; a *dictum* of Sir Raymond West in the Bombay High Court in the case of *Fatma Bibi* v. *Advocate-General of Bombay*[3] and a decision of Farran, J., in the same Court in the case of *Amrutlal Kalidas* v. *Shaik Husain*[4]). The weight of Ameer Ali J.'s opinion on this subordinate point is somewhat lessened by his support of the gift under consideration on the very broad grounds which their Lordships have considered to be untenable. The *dictum* of Sir R. West is mentioned in *Ahsanulla Chowdhry's* case. Farran, J., had before him a case very closely resembling the present one. He described the settlement as "A perpetuity of the worst and most pernicious kind, and would be invalid on that ground unless it can be supported as a *wakfnama*"[5]; and he thought that the authority of the Hedaya is against it; but he adopted the principle stated by Sir R. West, which he treated as a decision, and he supported the gift on the strength of the ultimate trust for the poor.

Their Lordships cannot assent to these conclusions. They make words of more regard than things, and form more than substance. In their judgment the Calcutta High Court, have in this case rightly decided that there is no substantial gift to the poor. A gift may be illusory whether from its small amount or from its uncertainty and remoteness. If a man were to settle

[1] L. R. 17 I. A., 28; I. L. R., 17 Calc., 498.
[2] I. L. R. 20 Calc., 116.
[3] I. L. R. 6 Bom., 53.
[4] I. L. R., 11 Bom., 492.
[5] I. L. R., 11 Bom. 497.

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a crore of rupees, and provide ten for the poor, that would be at once recognised as illusory. It is equally illusory to make a provision for the poor under which they are not entitled to receive a rupee till after the total extinction of a family; possibly not for hundreds of years; possibly not until the property had vanished away under the wasting agencies of litigation or malfeasance or misfortune; certainly not as long as there exists on the earth one of those objects whom the donors really cared to maintain in a high position. Their Lordships agree that the poor have been put into this settlement merely to give it a colour of piety, and so to legalize arrangements meant to serve for the aggrandizement of a family.

They will humbly advise Her Majesty to dismiss this appeal with costs.

Appeal dismissed.

NOTE.

This case has finally decided that by the Mahomedan Law no *wakf* can be valid, unless there is a substantial dedication of the property to the poor; and, six years later, in *Mujibunnissa* v. *Abdul Rahim*,[1] their Lordships observed with reference to the deed of *wakf* set up in that case: "Indeed the theory of the deed seems to be that the creation of a family endowment is of itself a religious and meritorious act, and that the perpetual application of the surplus income in the acquisition of new properties to be added to the family estate is a charitable purpose. It is superfluous in the present day to say that this is not the law."

So far therefore as British India is concerned the matter is settled beyond controversy, and the law can be altered only by the Legislature. Eminent Mahomedan jurists, both Indian and European, have, however, expressed their dissatisfaction with the law laid down by the Privy Council. The curious reader will find a fairly complete account of the remarkable controversy to which the decision in the principal case gave rise in an article in the Second Volume of the *Calcutta Law Journal* contributed by Khan Bahadur Moulvi Mahomed Yousuf. The reader may, with profit, refer to Appendix B to Sir Ronald Wilson's Digest of Anglo-Mahommadan Law (2nd Ed., p. 894).

[1] (1900) L. R. 28 I.A. 15 at p. 36; I. W. N. 23 All. 233 at p. 245.

RANEE KHUJOOROONISSA
v.
MUSSAMUT ROUSHUN JEHAN.[1]

[*Reported in L. R., 3 I. A., 291 ; I. L. R., 2 Calc., 184.*]

1876, *May, 18.*

The judgment of their Lordships was delivered by

Sir Robert P. Collier.—This case, which fills a great mass of printed paper, and has occupied much time, finally resolves itself into a few points not attended with any very great difficulty. In order to make those points intelligible, a short history of the whole case appears to be necessary. Rajah Deedar Hossein died in 1841, possessed of half of the large *zemindary* of Soorjapore. He left five sons and five daughters. According to the contention of the one side, he left five widows ; according to the contention of the other side, he left one wife and four concubines. Enayut Hossein, his eldest son, possessed himself of all the property of the deceased Rajah by virtue of two documents which he set up, and which will have to be referred to subsequently, one being a deed of gift as it is called, and the other a will, both dated the 18th of November, 1839, about two years before the death of the Rajah.

The first document purported to convey to Enayut one-third of the *zemindary*. The will may be shortly described as giving to Enayut Hossein a third of what remained, burdened with a trust of a somewhat indefinite character for pious uses, but with a bequest of the residue after those pious uses had been satisfied, to the beneficial use of Enayut himself. Enayut was put into possession of the whole of the landed property, and it was directed that the other children were not to be enabled to sell or dispose of their shares in any way. Enayut was to pay them certain annuities, which he does not appear to have done, and it was only of the personal property that a division was directed in accordance with the Mahomedan Law. By virtue of these documents Enayut took possession of the property of his father, and appears to have reduced the other members of the family to a state of poverty. He struggled for some time to obtain mutation of names, in pursuance of these documents. The mutation was opposed by other members of the family,

[1] *Present*:—Sir James W. Colvile, Sir Montague E. Smith, and Sir Robert P. Collier.

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but was finally obtained in 1844 upon Enayut giving security. After that time some abortive suits were instituted by different members of the family *in formâ pauperis*; but the first proceeding necessary to notice at all at length, is a suit instituted by Khoobunissa, who was the widow of Nuzeeroodeen, the third son of Rajah Deedar Hossein, in 1852, as guardian and protector of her infant daughter Roushun Jehan (the present plaintiff), to set aside both the deed and the will, and to obtain possession on behalf of her daughter of a fourteen-annas share (the daughter's share) of the property of Nuzeeroodeen. She appears to have also brought a suit for the other two annas on her own behalf.

This suit came to be heard before Mr. Loch, who was the Judge at Purneah in 1855. His decision was to the effect that both the documents, the deed and the will, were in fact executed by the Rajah Deedar; that the deed was valid, but that the will was invalid because it had not obtained the consent of the heirs other than Enayut, which according to his view of the will was necessary by the Mahomedan Law. Enayut Hossein appealed against that decision, and Khoobunissa would have had an undoubted right to her cross appeal but for what subsequently transpired. Pending this suit, which was decided in 1855, Enayut Hossein had instituted a cross suit against Khoobunissa for the purpose of carrying into effect an alleged compromise to which he said she was a party, he alleging that she had received some Rs. 31,000, and had executed a document compromising the suit in his favour. This she denied. Issues were raised upon it, and this case came on for trial in August, 1856, rather more than a year after the other decision. But on the 30th of August of that year a compromise, which, in some respects, may be undoubtedly called a real compromise, was come to. Khoobunissa then filed a document, in which she declared that she would not any longer contest the questions between her and Enayut Hossein; that she had received certain money from him, and agreed altogether to his terms, and in that document there was a statement that her daughter Roushun Jehan assented to this compromise. Roushun Jehan was also represented as a party to the transaction, and as asserting herself to be of age. That compromise was given effect to by Mr.

Loch; it was also given effect to by the Sudder Dewanny Adawlut Court, which dismissed the appeal, and gave a decree in the terms of it in December, 1856.

Roushun Jehan, the present plaintiff, in 1859 married Syud Ahmed Reza, a member of the other branch of the family, who possessed the half of the purgunah Soorjapore other than that which was held by Deedar Hossein; and in 1860 she filed a suit, in which she asserted that she was no party to and had no knowledge of the compromise between Enayut and her mother, and that it was effected by fraud and collusion on the part of both of them. She prayed that that compromise might be set aside, and she prayed in substance for a review of the judgment of Mr. Loch, so far as it was against her. She made also three further claims; the first to a share derived by her father from his brother Edoo Hossein, who had died before him; the second to a share in right of her grand-mother, Bibee Loodhun, whom she alleged to have been a wife of Deedar Hossein. She thirdly claimed that there should be added to the whole zemindari property a portion which Enayut Hossein had recovered by a decree of this Board against the Rezas, in respect of the right of his grand-mother Ranee Sumree. It may be as well at once to dismiss this part of the case, by stating that it is not now denied on the part of Enayut that he recovered this sum, not in his own right, but as a trustee for all the other members of the family.

This suit appears to have been deplorably dealt with in the inferior Courts of India. It came first before Mr. Beaufort, who framed a certain number of issues, and proceeded as far as deciding the issues in bar. Then it came before Mr. Birch, who upset all that Mr. Beaufort had done, and dismissed the suit altogether in a summary manner, on the ground that the cause of action was not stated with sufficient precision. The High Court set this mistake right by remanding the cause to be retried; whereupon it came before Mr. Simson, who had succeeded Mr. Birch, Mr. Simson, who seems to have very imperfectly apprehended the nature of the suit, framed an issue, which by no means decided it, and after his trial (if it can be so called) of the case, it came before the High Court again, and was again remanded. This occurred in January or February, 1864, when a very careful and luminous judgment was given by

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the Chief Justice, Sir Barnes Peacock and another member of the Court, which it is now necessary more particularly to refer to. The High Court, after stating that the case had not been properly tried or even apprehended, remanded it for the following issues to be tried, in addition to the one laid down by Mr. Simson, which was as to the validity of the deed. "1. Was the plaintiff of age according to the Mahomedan Law, independently of Regulation XXVI of 1793, at the time when the alleged compromise was effected? 2. Did the plaintiff execute the documents which purport to have been executed by her, or any and which of them? 3. If so, was she induced to execute the same by means of fraud or misrepresentation? 4. Was the compromise a fair one and beneficial to the plaintiff? 5. Did the plaintiff receive any portion of the money alleged to have been paid by the defendant or any portion of the profits of the *putnee talook*? 6. Did the plaintiff's mother Khoobunissa receive the money? 7. Were all or any and which of the receipts, alleged by the defendant in his written statement to have been executed by the plaintiff, executed by her? 8. Was the decree in the *Zilla* Court of Purneah of the 30th of August, 1856, establishing the receipt for the Rs. 31,400, obtained by fraud or misrepresentation? 9. Was the decree of the Sudder Court of the 10th of December, 1856, founded on the alleged compromise, obtained by fraud or misrepresentation? 10. If not, was it binding on the plaintiff as carrying out an arrangement beneficial to her, which her mother, as her guardian, was competent to enter into." The High Court proceed to say: "These are the issues which we consider necessary for a proper determination of the plaintiff's right to set aside the decree of the Sudder Court. It appears to us that this appeal is in the nature of a bill for a review of judgment, and therefore when the decree is set aside by virtue of regular suit, the same rights will arise as if the Court upon review of judgment had set aside it own decree." Then they go on to say: "The above issues will apply of course to the plaintiff's claim only so far as affects that portion of Deedar Hossein's property which was the subject of the former suit, but they do not apply to the shares which belonged to her uncle and her grand-mother, or to the share of the property recovered by the defendant by the decree of the

Privy Council, These are wholly distinct matters from that at issue before Mr. Loch, and therefore as to them, we think it proper to lay down the following issues to be tried by the Judge." Then come six more issues: "1. Did the father of the plaintiff survive her uncle Edoo Hossein, and is the plaintiff entitled to recover any and what portion of the share, if any, of her uncle Edoo Hossein, in the estate of the plaintiff's late grand-father, Rajah Deedar Hossein? 2. Did Edoo Hossein receive the allowance given by his father's will, or assent to the will? 3. Did the plaintiff's grand-mother, Mussamut Bibee Loodhun *alias* Saemah, succeed to any and what portion of the estate of Rajah Deedar Hossein? 4. Did Bibee Loodhun take the allowance as alleged in the defendant's written statement? 5. Is the plaintiff entitled to recover any and what portion of Bibee Loodhun's share, if any, of Rajah Deedar Hossein's estate? 6. Is the plaintiff entitled to recover any and what portion of the one-anna-eight-gundas share of the zemindary of Soorjapore, recovered by the defendant under decree of the Privy Council dated the 14th of July, 1859?

All the first ten issues which related to the validity of the compromise in the suit which was heard before Mr. Loch, and came before the Sudder Dewanny Adawlut, were decided by the Judge, Mr. Muspratt, before whom this case came on its remand, in favour of the plaintiff With respect to the latter issues, the Judge found against the plaintiff upon the question of Edoo Hossein surviving his brother Nazeeroodeen, her father, and he found against her on the question of her right to succeed to any portion of the property of her grand-mother, Bibee Loodhun. The case came on appeal before the High Court, who gave a very elaborate judgment in January, 1866. The High Court agreed with the learned Judge of the *Zilla* Court in his finding on all the ten issues relating to the compromise, and there being two concurrent findings upon these issues, which are questions of fact, their Lordships are by no means disposed to disturb them. Indeed, it has scarcely been argued that, giving effect to the rule on this subject, they should be disturbed.

The High Court next came to the conclusion that the compromise being set aside, owing to fraud and collusion on the part of Enayut Hossein, Enayut Hossein's right of appeal

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against Mr. Loch's judgment was not revived, whereas the right of appeal on the part of the plaintiff Roushun Jehan was revived. From that finding their Lordships differ. It appears to them that the effect of setting aside the compromise was to remit both parties to their original rights, and that if the plaintiff is to be allowed to be heard to appeal against so much of the decision of Mr. Loch as is against her, Enayut Hossein ought to be heard to appeal against so much of the decision as is against him. The High Court further affirm the decision of Mr. Loch on the subject of the will, which was in favour of the plaintiff, but they reverse his decision as far as it concerns the deed, which was against her. Further, they reverse the decision of Mr. Muspratt upon the two questions of the right of the plaintiff to succeed to Edoo Hossein, and her right to succeed to her grand-mother. The case, therefore, reduces itself to four questions—*first*, the validity of the deed; *secondly*, the validity of the will; *thirdly*, the survivorship between Edoo and Nazeeroodeen; and *fourthly*, the plaintiff's right to succeed to her grand-mother.

The policy of the Mahomedan Law appears to be to prevent a testator interfering by will with the course of the devolution of property according to law among his heirs, although he may give a specified portion, as much as a third, to a stranger. But it also appears that a holder of property may, to a certain extent, defeat the policy of the law by giving in his lifetime the whole or any part of his property to one of his sons, provided he complies with certain forms. It is incumbent, however, upon those who seek to set up a proceeding of this sort, to shew very clearly that the forms of the Mahomedan Law, whereby its policy is defeated, have been complied with. There is no question of the execution by Rajah Deedar Hossein of this deed giving one-third to his son, Enayut, on the 10th of November, 1839. The deed was either—to use English expressions—a deed of gift simply, or a deed of gift for a consideration. If it was simply a deed of gift without consideration, it was invalid unless accompanied by a delivery of the thing given, as far as that thing is capable of delivery, or, in other words, by what is termed in the books a seisin on the part of the donee. In their Lordships' judgment there was no delivery of this kind.

Even assuming that although the estate was under attachment, a sufficient seisin in it remained to the donor which he could impart to the donee, still it appears by the evidence of Mr. Perry, which is treated as trustworthy on both sides, that in point of fact Rajah Deedar Hossein remained in receipt of the rents and profits of the property until his death. Therefore, if the deed were a mere deed of gift, there was not that delivery of possession which was necessary to give it effect by Mahomedan Law. A question which was touched upon, though not much argued, *viz.*, whether the doctrine of Mahomedan law relating to "confusion of gifts" applied, appears not to arise, as there was no delivery of possession.

But it was contended that this was a deed of gift for a consideration, and therefore that the delivery of possession was not necessary. But it was, however, conceded that in order to make the deed valid in this view of the case, two conditions at all events must concur, *viz.*, an actual payment of the consideration on the part of the donee, and a *bonâ fide* intention on the part of the donor to divest himself *in presenti* of the property, and to confer it upon the donee. Undoubtedly, the adequacy of the consideration is not the question. A consideration may be perfectly valid which is wholly inadequate in amount when compared with the thing given. Some of the cases have gone so far as to say that even a gift of a ring may be a sufficient consideration; but whatever its amount, it must be actually and *bonâ fide* paid.

Upon the subject of consideration there is the evidence of Mr. Perry, who was present at the time of the execution of the document, who says that the Rajah admitted that at some previous time he had received the consideration. There is the evidence of Enayut Hossein himself, who speaks to having paid the consideration, although he does not condescend to any particulars; and there is the evidence of one or two other witnesses, who speak of the consideration being given at the time of the execution, which appears scarcely reconcilable with the evidence of Mr. Perry. But the whole transaction must be looked to Mr. Perry speaks, as far as his knowledge is concerned, of the deed remaining in the possession of Rajah Deedar Hossein, although no doubt there is some evidence to the opposite

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effect. But it is certain that no proceeding was taken for obtaining mutation of names for more than twelve months after the execution of the deed. A petition was presented on the 16th of March, 1841, purporting to be on the part of the Rajah, and requesting a mutation of names, and there was another by Enayut on the 3rd of May of that year. But, on the 19th of June of that year, Rajah Deedar presented a petition altogether repudiating the transaction, declaring that he had received no consideration money whatever, that it was not intended that any transfer should take place until after his death, and praying that the mutation of names should not be effected. On being questioned what his real wishes were, he still persisted in declaring his wish that Enayut should not be substituted for him in the books of the Collectorate. It is true that on the 19th of November, 1841, a petition was laid before the Collector, purporting to come from Deedar Hossein, in which he set up the transaction, declaring that he had received the consideration money, and desiring that the name of his son should be entered, but that was several days after he was dead. He died on the 15th. The petition was dated on the 14th, received on the 19th, and the Collector very properly declined to act upon it. No evidence was given as to the state of the Rajah when he executed this petition, so shortly before his death (if indeed he did execute it), although Raja Enayut Hossein and Heera Lal, the *mokhtear*, who was concerned in it, either of whom could probably have given information on the subject, were not examined as witnesses in the cause.

Taking into consideration all these circumstances, their Lordships have come to the conclusion that the transaction set up on behalf of the defendants was not a real one, that no real consideration passed, that there was no intention on the part of the Rajah to part with the property at once to his son, but that both father and son were endeavouring to evade the Mahomedan law, by representing that to be a present transfer of property which was intended only to operate after the father's death. Their Lordships, therefore, agree with the High Court in their view of the effect of the deed.

The next question arises as to the will. It was found as a fact by Mr. Loch that the heirs had not consented to this will;

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and with that finding their Lordships are satisfied. But it was argued by Mr. Cowie, *first*, that the will did not require confirmation; *secondly*, that at all events so much of it as gave one-third to Enayut Hossein for pious uses was not in contravention of Mahomedan Law, and was therefore valid without confirmation. The effect of the will is, in the first place, to declare Enayut Hossein, the executor and representative of Deedar, and to direct him to look after the *zemindary*, and so forth. Then follows this passage: "I divide the remaining two-thirds now under my possession, uninterfered and unconcerned by any one else, into three portions. One portion to be laid out as the executor may think proper for my, the testator's, welfare hereafter, by charity and pilgrimage, and keep up the family usage, namely, the expenses of the mosque, and *fuzeeadaree* of the sacred martyrs, and for the comfort of the travellers, the surplus amount to be appropriated by himself, the executor. From the other two-thirds, after paying off all the debts of my creditors, giving allowances as per shares to the executor himself and my sons, daughters, and wives, the right-holders, and salary-holders, that is friends and servants, repairs of houses and Court expenses, etc., including other necessaries as below detailed without diminution and increase; he shall keep every one by his good conduct and affection contented and satisfied. It is also necessary for all persons having rights, heirs, and friends connected with me, to obey the said executor and consider him my representative." * * *

"None of the heirs have power to sell, or divide the landed property mentioned in the will." * * *

This will, in its general scope, appears to their Lordships to be in contravention of Mahomedan Law. With respect to the limited contention, that it may be supported with respect to the devise of the one-third share, it appears further to their Lordships that that devise, considering the vague character of it, and that the beneficial interest is left to Enayut Hossein after he has devoted what he may deem sufficient to certain indefinite pious uses, is in reality an attempt to give, under colour of a religious bequest, an interest in one-third to Enayut Hossein, in contravention of Mahomedan law.

The survivorship between Edoo and Nazeeroodeen is a question made by no means clear on either side. Mr. Muspratt

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appears to have decided it almost, if not entirely, upon the ground that Enayut Hossein put in certain proceedings *in formâ pauperis*, the petition to sue and other documents, purporting to have been executed by Edoo in 1845. If he did then execute them, undoubtedly he had survived his brother, who died in January or February, 1844. There appears to have been oral evidence on both sides; on the one side, that Edoo lived until 1845, on the other, that he died some time in 1843, a few months before his brother. The judgment of the High Court appears to be in effect that after a very careful consideration of these documents, after directing various searches for the originals, of which attested copies were produced, which searches proved fruitless, they have come to the conclusion that these documents are not genuine. Their Lordships do not feel that sufficient material is laid before them to satisfy them that the High Court were wrong in that decision. These documents being rejected as fabricated, the Court say in substance that they credit the testimony of the plaintiff rather than that of the defendant, who had shewn himself capable of fabricating documents, and that they do not in this question believe witnesses who on other parts of the case had not been believed.

Under these circumstances, whatever might have been their Lordships' view if the case had come before them as a tribunal of first instance, they do not think that sufficient ground has been shewn for reversing the decision of the High Court.

There remains the question of the right of the plaintiff to succeed to Bibee Loodhun, and that depends upon whether Bibee Loodhun was merely a concubine or a wife. It is an undisputed fact that Nazeeroodeen, the son of Bibee Loodhun, was treated by his father and by all the members of the family as a legitimate son. It is not that he was on any particular occasion recognized by his father, but that he always appears to have been treated on the same footing as the other legitimate sons. This of itself appears to their Lordships to raise some presumption that his mother was his father's wife. That such a presumption arises under such circumstances appears to have been laid down in a case which has been referred to, *Khajah Hidayut Oollah* v. *Rai Jan Khanum*,[1] in which Dr. Lushington,

[1] 3 Moo., I. A., 295, at p. 318.

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who delivered the judgment of this Board, makes this observation :—" The effect of that appears to be, that where a child has been born to a father, of a mother where there has been not a mere casual concubinage, but a more permanent connection, and where there is no insurmountable obstacle to such a marriage, then, according to the Mahomedan Law, the presumption is in favour of such marriage having taken place." In this case there is no evidence that Bibee Loodhun was a woman of bad character, or that her connection was merely casual. She appears to have lived in the house at all events up to the death of the Rajah.

The same doctrine was laid down rather more strongly in a recent case, which came before this Board on the 20th of March, 1873. In the case of *Newab Mulka Jehan Sahiba* v. *Mahomed Ushkurree Khan*,[1] a case from Oudh, and a Sheeah case, their Lordships say :—" This treatment of the daughter by the appellants "—that is to say, the treatment of the daughter as a member of the family,—" affords a strong presumption in favour of the right of her mother to inherit from her." The question there was whether the mother, who was said to be a slave girl, inherited from her daughter, whom she survived, the same question which would have arisen in this case if Bibee Loodhun had survived her son Nazeeroodeen. Their Lordships go on to say, after noticing various acts of acknowledgment of the legitimacy of the child :—" After these acknowledgments, Mulka Jehan and the appellants who act with her ought in their Lordships' view to have been prepared with strong and conclusive evidence to rebut the presumption raised by their own acts and conduct ; and in the absence of such evidence, they think the presumption must prevail."

It appears to their Lordships, therefore, that the undoubted acknowledgment by the father and by the whole family of the legitimacy of Nazeeroodeen raises some presumption of the marriage of his mother. But it is said that that presumption is rebutted. The evidence chiefly relied upon for that purpose is the will of the Rajah in which undoubtedly there is this expression :—" For the maintenance of four female servants monthly, 75 ; annually 900," and Bibee Loodhun does appear to have been one of those female servants there mentioned. At the same time,

[1] 8 Mad. Jur., 306.

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it is to be observed, this expression occurs only in the schedule; whereas in a part of the will preceding that schedule there is this expression:—"The shares of the executor and of the sons, daughters, and wives of the testator and other claimants from the estate fixed annually at" so and so; and the subsequent provision for the maintenance of every female servant appears to be an expansion of that paragraph in which they are spoken of as wives.

But further, there is the undoubted acknowledgment by Enayut Hossein himself of Bibee Loodhun being a wife, inasmuch as when Khyroonnissa, the principal wife, brings a suit against him, Enayut Hossein objects on the ground that Bibee Loodhun, one of the other wives, is not joined.

Under these circumstances it appears to their Lordships that there is evidence not only from the acknowledgment of Nazeeroodeen's legitimacy by the family, but from the admission of Enayut Hossein, that Bibee Loodhun was a wife, and not merely a servant. It is indeed alleged that she was what is called a temporary wife, and among the Sheeah sect there appears to be a power of taking a mere temporary wife. But it is to be observed that there is no evidence of her marriage being what is called a temporary marriage, and indeed the witnesses who seek to impugn the marriage on the part of the defendant speak of Bibee Loodhun not as a temporary wife but as a mere servant. The question, therefore, seems to be not whether she was a temporary wife in the sense attached to that term in Mahomedan treatises, but whether she was a wife or whether she was a mere servant. On the whole, their Lordships concur with the finding of the High Court. The evidence preponderates that she was a wife and not as a mere servant, though no doubt a wife of an inferior order.

A question further arose as to the amount of the share which the plaintiff would be entitled to, assuming that Bibee Loodhun was a wife, and it would certainly seem that her share would only be a fifth of an eighth, that is, a fortieth share; whereas she appears to have received something more by the decree of the Court. But it is to be observed that this, in a great measure, is a matter of detail, and possibly a clerical error or miscalculation, which might have been set right on an application to the High Court, and that in fact the High Court did invite applications for the purpose of remedying errors of this kind.

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The result is, that with the exception of the slight variation of amount in the case of the claim of Mussamut Bibee Loodhun, their Lordships will humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss this appeal with costs.

Appeal dismissed.

NOTE.

The rule of Mahomedan Law regarding gifts *inter vivos* laid down in this case has been recently re-affirmed in *Chaudhuri Mehdi Hasan* v. *Muhammad Hasan*, L. R., 33 I. A., 68.

The question, what is sufficient delivery of possession under the Mahomedan Law, has been discussed in numerous cases.

The first question is whether a person can make a valid gift of property not in his possession at the date of the gift; this question may be taken as settled by the decision in *Mahomed Buksh* v. *Hosseini*, I. L. R., 15 Calc., 684, in which their Lordships of the Judicial Committee held that, where the donor had done all she could to perfect the contemplated gift and the deed of gift authorized the *donees to take* possession and in fact they did, afterwards, take possession, no objection could be taken to the gift on the ground that the donor had not possession, and that she herself did not give possession at the time.

It was at one time doubtful whether a Mahomedan could make a gift of property in the possession of a lessee or mortgagee. It may now be taken to be settled that a gift of property in possession of a lessee is valid under the Mahomedan Law; *Mullick* v. *Mulekee*, I. L. R., 10 Calc., 1112; the case of gift of property in possession of a mortgagee has been left in some doubt by a recent decision in Bombay, *Ismal* v. *Ramji*, I. L. R., 23 Bom., 682, which is against the validity of such a gift.

It would seem to be an undesirable refinement to hold that there can be no delivery of possession where both the donor and the donee are, at the date of the gift, in occupation of the property; such a view, if adopted, would render gift between husband and wife almost impossible. It has been held that when two are present on the same premises the manifestation of an appropriate intention will put the one out of, and the other into, possession without any actual physical departure or formal entry: *Shaik Ibhrom* v. *Shaik Suleman*, I. L. R., 9 Bom., 146.

The doctrine of Mahomedan Law relating to "confusion of gifts" or *Mushaa* referred to by their Lordships in the principal case "is wholly unadapted to a progressive state of society and ought to be confined within the strictest limits": *Muhammad Mumtaz* v. *Zabaider*, I. L. R., 11 All., 460; see also *Mahomed Buksh* v. *Hosseini*, I. L. R., 15 Calc., 684. The Madras High Court in a recent case has declined to recognise the doctrine at all: *Alubikoya* v. *Mussakoya*, I. L. R., 24 Mad., 513.

On the doctrine of the legitimatising of issue by acknowledgment the reader would do well to consider *Abdul Razak* v. *Aga Mahomed*, I. L. R., 21 Calc., 666, where their Lordships of the Judicial Committee explain it and lay down the true limits of its application. On this doctrine and on the doctrine of presumption of marriage, see *Ashruffuddowla* v. *Hyder Hosain*, *Supra*.

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December, 15.

ASHRUFOOD DOWLAH
v.
HYDER HOSSEIN KHAN.[1]

[*Reported in 11 Moo. I.A., 94.*]

The consideration of their Lordships' judgment was reserved, and now pronounced by

The Right Hon. Sir James W. Colvile:

This is an appeal from a decree of Mr. Campbell, made by him when Chief Judicial Commissioner of Oude, which reversed a decision in favour of the appellants, the plaintiffs in the suit, made by Mr. Fraser, the Civil Judge at Lucknow. The case comes before their Lordships *ex parte*, and, difficult in itself, occasions by its being heard *ex parte* an increase of anxiety and difficulty. The appellants are son and daughter, and as such, heirs of Ameenood Dowlah, Bahadoor, the late *Vizier* of the ex-King of *Oude*. The respondent claims to be also a legitimate son, and as such a co-heir of the late *Vizier*, founding his claim on a *Moottah* marriage of his mother, and on his birth, in due course, as a son conceived in wedlock of that marriage. He relies also on the acknowledgment of him for many years by the late *Vizier* as his legitimate son. The appellants deny the alleged parentage, legitimacy, and acknowledgment.

The suit which gave rise to this appeal results from a precedent litigation between these parties, of which some account is necessary to a complete understanding of the cause.

At the time of the *Vizier's* death, the respondent was not *de facto* a member of his family, having been some time previously expelled by his reputed father, the *Vizier*, from the house, and renounced as a son, under a suspicion of a grave offence imputed to him. On that occasion the *Vizier* executed a formal instrument, which is described in the suit as "a deed of renunciation," declaring the respondent not to be his son. At the time of the *Vizier's* death, the respondent, whatever his legal *status*, was not *de facto* an apparent heir of the *Vizier*, and the possession of

[1] *Present*:—Members of the *Judicial Committee*,—The Right Hon. Lord Westbury, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams.

Assessor:—The Right Hon. Sir Lawrence Peel.

the *Vizier's* estate was, after his death, in some one or more of his undisputed heirs, and no risk of disturbance from disputes as to possession seems to have existed.

A portion of the property appears from the statements on the record to have consisted of Company's paper, indorsed generally to the heirs of the *Vizier*. But this state of indorsement did not require the institution of a merely possessory suit. In this state of things the respondent preferred a claim to be admitted as co-heir to a joint possession of the estate of the late *Vizier*, and his claim being disputed by the appellants, this gave rise to a summary suit to enforce his claim to possession. If a suit of this kind, which cannot determine rights, be instituted where the actual possession is quiet, and where the question in dispute necessarily involves rights, the claimant should at once be directed to proceed in a regular suit; for if he proceeds under the Acts subsequently referred to, an expensive and inconclusive litigation is the probable result.

It is unnecessary to go through the history of this previous litigation in detail, or to examine the correctness of the course adopted in its several stages. It was attended with varying success, and finally ended with a decree of Colonel Abbott, on appeal, in favour of the respondent. That gentleman, the Commissioner and Superintendent of the Lucknow division, after referring to the Acts of the Indian Legislature, Nos. XIX of 1841, XX of 1841, and X of 1851, under one or more of which the summary proceeding was instituted, observes of them: "They cannot determine right, but they place the *primâ facie* heirs in possession, and leave the subject to litigation in the proper course of law." This decision, then, was intended to establish a *primâ facie* title in the respondent as co-heir, leaving the right undetermined; but in this case no *primâ facie* title exists distinct from the complete title in dispute, the whole subject of litigation resting on legitimacy alone. The right to that *status* was left undetermined, and was to be decided in a regular suit, to which the appellants were referred.

In consequence of this decision, the appellants brought their suit in the Civil Court at Lucknow, on the 6th of June, 1861. The object of the suit, as it appears from the plaint, was to be relieved from the effects of that summary decree, and to establish

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the respondent's illegitimacy, so that the proceeding went on in a somewhat inverted order, arising from a misunderstanding of the object of those Acts. The plea is not set out at length, but an abstract of it is to be found in Mr. Fraser's judgment. The issues, as also the findings, are carefully framed, and evidence an accurate knowledge of the Mahomedan Law as to legitimacy. The first, second, and third issues are alone necessary to be stated here, as nothing which affects the decision of this appeal turns upon the fourth issue, which relates merely to the share, if legitimate, and a claim to maintenance, if illegitimate. The first, second and third issues are as follows :—

First, did Nawab Ameenood Dowlah (deceased) contract *Moottah* with defendant's mother before or after his birth ?

Second, has the deed of repudiation (dated, 23 Suffur, 1272, *Hijree*) the effect of cancelling previous acknowledgment of defendant's legitimacy, if such were made ?

Third, if defendant be not a legitimate son, is he an illegitimate son of deceased ?

It was admitted on the pleadings that a *Moottah* marriage at some time had been contracted between the late *Vizier* and the respondent's mother, but the plaintiff stated in effect that the conception and birth of the respondent preceded that marriage. The plea distinctly stated the marriage, though without assigning a date to it, and alleged the legitimacy of the respondent as a child born of that marriage. The existence of a *Moottah* marriage, therefore, at some time was not contested, and the first issue, which by implication admits a marriage, is framed correctly on that state of the pleadings. The second issue, it may be observed, is also very correctly framed. It substitutes for the ambiguous word "sonship," which might include an illegitimate son, the word "legitimacy," and uses the word "acknowledgment" in its legal sense, under the Mahomedan Law, of acknowledgment of antecedent right established by the acknowledgment on the acknowledger, that is, in the sense of a recognition, not simply of sonship, but of legitimacy as a son. The first and second issues include the two legal grounds of legitimacy, *viz.*, marriage and acknowledgment, to which the plea is limited. Acknowledgment in the sense of treatment, as evidence simply of marriage or of legitimation,

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could not have been included with propriety in the issues, though as evidence it would not lose any part of its efficacy by reason of the wording of the issues.

It is not necessary to state the evidence in detail, nor to weigh the conflicting direct evidence; since both Courts, *viz.*, the Civil Court and the Court of the Commissioner, agreed in their view of the facts generally on which the decision turned, the latter adopting the facts as stated in the judgment of Mr. Fraser. Mr. Campbell's judgment was founded mainly on the inferences which he drew from those facts.

Mr. Fraser was assisted in his decision of this important and difficult case by *Punchayet*, as it is termed, formed out of twenty Mahomedan gentlemen, selected with care, and reduced to ten by five challenges on either side; and as the reduced number consisted of ten men, including the high priest, and another Mussulman priest, all of whom are stated to have been mutually approved on both sides, a more competent tribunal could hardly have been appointed for the decision of such a case. Their opinion against the claim of the respondent was unanimous. Their opinion had substantially the concurrence of the Judge, Mr. Fraser, who made it the ground of his decision, treating them as Assessors, and concurring in their finding.

On a question of Mahomedan Law, so closely allied as it is with the religion of the Mahomedans, the opinion of priests of the dignity of these would be entitled to respect, since they are unlikely to be ignorant of it, or consciously to swerve from it. Such a decision, therefore, creates a more than ordinary presumption in favour of its correctness. It cannot readily be supposed that the high priests would sanction so irreligious an act, in the view of Mahomedans, as the sacrifice of a son's legitimate *status*, conferred by acknowledgment of a father, to mere caprice, or to resentment working on the mind of the father; and their decision does not seem to be open to the suspicion of a tendency in the members of the *Punchayet* unduly to augment a father's power. Upon turning to the findings of the issues, they appear to furnish no ground for questioning the care, or learning, or impartiality of the *Punchayet*.

On the *first* issue, they find that the *Moottah* marriage took place after birth. Mr. Fraser says that, according to the stronger

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evidence, inpregnation took place during the service, and, therefore, *primâ facie* before the marriage. The *second* finding is as follows: "We do not find that deceased's acknowledgment that Hyder Hossein was born of his body has been proved according to the conditions of the law; therefore, the deed of repudiation is correct." This finding, if it were construed literally, and disconnected from the context, would seem to favour the belief, which Mr. Campbell seems to have entertained, that the *Punchayet* may have been proceeding on some stricter rules of evidence, under the Mahomedan Law, than the procedure of the Courts at Lucknow authorised; but there is no proof that such was the case, and it cannot be presumed that any rules of the Mahomedan Law of evidence were adopted by them which they could not legally adopt. The presumption should be in support of the regularity of their course.

The rules of evidence of the Mahomedan Law were not generally in force there: it cannot be inferred without proof that they meant to be governed by rules of evidence foreign to the tribunal. The whole sentence must be read together. Their conclusion, "therefore, the deed of repudiation is correct," is a conclusion from the former part of the sentence, and they are plainly referring to that species of "acknowledgment" which the second issue embodies, *viz.*, one of legitimation, and not one simply constituting a piece of evidence. This is explained also by what follows in the statement of the priests as to the law, constituting proof of sonship. They reply, "Had the *Nawab* distinctly stated defendant to be his son, whether orally or in writing, that would have been conclusive." They say nothing here of any peculiarity of proof of such a statement as a necessary condition of its legitimating power. The conditions of law to which this passage probably refers, are those which are to be found in the 3rd Volume of the Hedáya, p. 168, title "Miscellaneous Cases," which treats of acknowledgment of parentage; and the terms "conditions of law" would refer on that supposition to "acknowledgment," and not to be the more immediate antecedent "proved." But supposing that the learned Commissioner was correct in his conclusion that the *Punchayet* had proceeded on some special rule of evidence under the Mahomedan Law, applicable to acknowledgment of parentage, the rejection of their finding

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on that ground merely would not be reconcilable altogether with the opinion expressed by the Privy Council in their judgment, in the case of *Khajah Hidayut Ollah* v. *Rai Jan Khanum*[1]; "We apprehend," say their Lordships, "that in considering this question of Mahomedan Law (that is, the question of legitimacy), we must, at least to a certain extent, be governed by the same principle of evidence which the Mussulman lawyers themselves would apply to the consideration of such a question."

The general rules of evidence of the Mahomedan Law did not prevail in the Courts in which that cause was heard, any more than they prevail in the Courts at Lucknow; but in relation to that particular subject, so intimately connected with family feelings and usages, that deference was recommended if not enjoined.

Taking the whole of this finding together, and viewing it with relation to the particular issue which it finds, it appears to do no more than say, "As sonship does not appear (that is as the respondent is one of doubtful parentage), the deed of repudiation is correct, whereas it would have been untenable after an established acknowledgment"; this reconciles the opinion here expressed with that of the Mahomedan high priest, who says that a denial of a son either of a *Nikahee* or *Mootahee* wife, after an established acknowledgment, will, according to the Mahomedan Law, be untenable.

On the *third* issue, they find thus: "We do not find it proved that Hyder Hossein is a son begotten of the body of the deceased *Nawab*." The propriety of this finding with reference to the matter in dispute, *viz.*, legitimacy, resolves itself into the question, whether, on the whole evidence in this cause, legitimacy ought to have been declared to be established. The consideration, therefore, of this part of the case is for the present postponed.

In the judgment of Mr. Fraser, he states, in the commencement of it, "that the *onus* of proof in this case was thrown on the plaintiffs, for the defendant had acquired the right of being regarded as one of the legitimate sons of the late *Nawab* Ameenood Dowlah, such being the summary judgment passed by the Commissioner." The reason assigned seems to admit the

[1] 3 Moo. I. A., 318.

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correctness of the general rule, and to assign to the appellants the burthen of proving what is substantially a negative, to the inversion also, in this case, of the ordinary course of proceeding as to possession. The title of the respondent, if established, was one in privity with the appellants' title. The mere fact of possession of a portion of the disputed property by either party was not a matter of any importance to the decision of the question on whom the burthen of proof rested in this cause ; that depended on the nature of the issues.

Mr. Leith made this inversion of the usual order of proof a subject of complaint against the decision. In many cases, undoubtedly, an unauthorized transfer of possession would work serious injury and injustice to a claimant ; but in this particular case it does not appear that the mistake as to the transfer of possession, and as to that of the *onus probandi*, which, in the judgment of Mr. Fraser, it involved, worked any real injustice or imposed any difficulty on the appellants from which they would otherwise have been free ; and their Lordships' decision is unaffected by this objection.

This preliminary objection to the mode in which the case was dealt with below being removed, it becomes necessary to view the whole of the facts in proof in the cause ; for the case really depends on a conflict of evidence, and the due application of presumptive proof. The facts on which the Commissioner grounded his decision he took from the judgment of Mr. Fraser in the Court below, but they require to be stated, with one not unimportant addition, the want of which was made, on the argument, a ground for questioning the correctness of his view of the facts.

It appears to have been a mere omission of statement ; the fact does not appear to have escaped the attention of the Commissioner. The addition required is this—that the mother of the respondent entered the *Vizier's* family as a servant in a menial capacity, and served in that capacity for some time, and after some period of service was taken behind the *purdah*. The *Vizier*, it may be observed, was then simply a *darogah*, not much elevated in position above the woman whom he hired and afterwards married. The facts, then, when stated more fully, should stand thus : that the mother of the respondent entered the service of the *darogah*, afterwards the *Vizier*, in a menial position, as cook ; that she

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was a widow; that the date of her husband's death was not proved; that she went out in the course of her service into the *bazaar* to make purchases, and was taken subsequently behind the *purdah*; that the date of the commencement of her co-habitation with the *darogah* was not proved; that the dates of her pregnancy and of the birth were not proved; that the date of the *Moottah* marriage was not proved; and that it was not proved that any change in her position or treatment occurred before the date of her pregnancy. There is, therefore, a total failure of proof whether marriage preceded or followed pregnancy. Mr. Fraser said that pregnancy commenced during the service. Mr. Campbell removed the difficulty by a presumption of an antecedent marriage. Can the defect of the evidence in this case be supplied by a presumption placing that marriage itself at a time anterior to pregnancy? This is the main question in the cause.

It is to be observed, in considering the propriety of strengthening the weakness of the direct proof by this last presumption, that the mother was living at the time of the trial, and that the date of her marriage was a fact which she was competent to prove, as well as the time of the birth of her child. No explanation has been afforded by the Judges who have heard this cause why the evidence fails on these important points, or why that is to be worked out by a presumption from marriage which living testimony might support, especially in a case where the treatment has been interrupted, and an impediment of more or less weight interposed by the repudiation of the parentage by the reputed father. It would be an easy matter to legitimatize a child conceived before marriage by withholding proof of the time of marriage, and resting on an inference from the marriage itself. These or similar reasons may have been present to the minds of the *Punchayet* when they found on the first issue, that the birth preceded the *Mooltah* marriage. It is not important to consider the real nature of such a document. It has no effect whatever on the *status* of a legitimate son, whether legitimate by birth or made legitimate by acknowledgment. The finding of the *Punchayet* does not contravene that position. Their finding on the issues as to acknowledgment and sonship leaves the respondent in the position of a son of an unacknowledged father. On the *status* of such a son the renunciation may be operative according

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to the Mahomedan Law ; but it is not conclusive, and may be contradicted and disproved, and does not seem to be more weighty in itself than a declaration by a deceased parent in a case of pedigree. The *Punchayet* say that the renunciation is correct, that is, that their law admits it to take effect ; whereas in either of the other cases "the denial is untenable." It might be inferred from the proceedings of the *Punchayet* alone, that such an instrument is in use among the Mahomedans : a similar document was admitted in proof in a case which came before the Privy Council, *Jeswant Sing-jee Ubby Sing-jee* v. *Jet Sing-jee Ubby Sing-jee*.[1] Had this deed of renunciation been evidence on which reliance could be placed as to the denial of sonship which it contained, then it might have sufficed to displace a mere presumption of legitimacy, founded on treatment as a son of one in truth illegitimate. It might be designed, and suffice to remove a growing repute. That document, however, cannot be relied on. It was executed under great resentment ; it spoke the mind of one irritated by a grievous sense of wrong, and it would be dangerous to give effect to such a document, so prepared and executed, and to place it in the power of an irritated man to bastardize his offspring by an instrument executed under a sense of wrong, especially amongst a vindictive race. It is so difficult to credit the story that the *Vizier* adopted the respondent, who on that supposition would be the bastard son of a woman of low degree by some unknown father, that the insertion of that statement in the deed detracts greatly from its credit ; an untrue account of the origin of the *Vizier's* connection with the respondent gives rise to some degree of suspicion that the disclosure of the real state of the case might aid the respondent's claim to be deemed legitimate.

As it appears, then, that the *Punchayet* below, and the Court which adopted its finding, attached an undue importance to this deed of renunciation, and as this undue estimate of its weight may have greatly influenced their findings on the other issues, the learned Commissioner seems to be substantially correct in forming his own judgment independently of the findings, in which there had been a miscarriage. Whether he

[1] 3 Moo. I. A., 253.

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was correct in deciding the issues in favour of the respondent, is a doubtful and difficult question. It would be desirable to know to what authorities, if particular cases were in his contemplation, Mr. Campbell refers.

Unfortunately he does not name any, but he refers to Mr. Baillie's "Book on Inheritance" as questioning the broad assumption that "mere continued co-habitation suffices to raise such a legal presumption of marriage as to legitimatize the offspring." This statement drops the important qualification "with acknowledgment."

This binding decision on this subject must be looked for in the judgments of the Privy Council. No decision can be found there which supports so broad an assumption, or which, when rightly understood, is in conflict with the law, as stated by the priests in this case.

The presumption of legitimacy from marriage follows the bed, and whilst the marriage lasts, the child of the woman is taken to be the husband's child; but this presumption follows the bed, and is not antedated by relation. An antenuptial child is illegitimate. A child born out of wedlock is illegitimate; if acknowledged, he acquires the *status* of legitimacy. When, therefore, a child really illegitimate by birth becomes legitimated, it is by force of an acknowledgment express or implied, directly proved or presumed. These presumptions are inferences of fact. They are built on the foundations of law, and do not widen the grounds of legitimacy by confounding concubinage and marriage. The child of marriage is legitimate as soon as born. The child of a concubine may become legitimate by treatment as legitimate. Such treatment would furnish evidence of acknowledgmeut. A Court would not be justified, though dealing with this subject of legitimacy, in making any presumptions of fact which a rational view of the principles of evidence would exclude. The presumption in favour of marriage and legitimacy must rest on sufficient grounds, and cannot be permitted to override overbalancing proofs, whether direct or presumptive. The case of *Mahomed Baukar Hossain Khan* v. *Shurfoon Nissa Begum*[1] affirms this principle.

[1] 8 Moo. I. A., 159.

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Their Lordships said in that case, which was one of legitimacy under the Mahomedan Law:—"In arriving at this conclusion, they wished to be distinctly understood as not denying or questioning the position that, according to the Mahomedan Law, the law which regulates the rights of the parties before us, the legitimacy or legitimation of a child of Mahomedan parents may properly be presumed or inferred from circumstances without proof, or at least without any direct proof either of a marriage between the parents, or of any formal act of legitimation. Here there is, to their Lordships' judgment, an absence of circumstances sufficient to found or justify such a presumption or such an inference."

Their Lordships are not aware that these principles have ever been lost sight of in the Courts in India. They believe that they have been constantly observed by, and have guided the decisions of their Lordships in the Judicial Committee.

In the case of *Khajah Hidayut Oollah* v. *Rai Jan Khanum*[1] already cited, it is observed in the judgment:—"Without going into the question of the oral evidence, whether there was an express acknowledgment of the child by Fyz Ali Khan, as the son or not, there seems to be that which at least is tantamount to oral evidence of any declaration, because there is a consecutive course of treatment both of the mother and the child for a period of between seven and eight years, under circumstances in which it appears to their Lordships to be next to impossible that such a mode of treatment would have been continued except from the presumption of the co-habitation, and of the son being the issue of the loins of Fyz Ali Khan." The co-habitation alluded to in that judgment was continual; it was proved to have preceded conception, and to have been between a man and woman co-habiting together as man and wife, and having that repute before the conception commenced; and the case decided that not co-habitation simply and birth, but that co-habitation and birth with treatment tantamount to acknowledgment, sufficed to prove legitimacy. The presumption throughout the whole judgment is treated as one of fact.

It would be much to be regretted if any variance on this important matter arose between the decisions of the Courts and

[1] 3 Moo. I. A., 323.

the text of the Mahomedan Law of legitimacy as understood and declared by the high priest, connected as their law and religion are. Such a variance exists between the law as expounded in this case, and the position contained in Mr. Campbell's judgment, that "mere continued co-habitation suffices to raise such a legal presumption of marriage as to legitimize the offspring." This position, if established, would have sufficed to legalize the *status* of the claimant in the case before referred to, *Mahomed Baukar Hoossain Khan* v. *Shurfoon Nissa Begum*[1] for in that case there was abundant evidence of continued co-habitation between the father and the mother of the claimant; but as there was no proof in that case either of marriage or of acknowledgment, he was adjudged to be illegitimate.

This case, then, must be determined on the principles of evidence which are applicable to presumptive proof, every reasonable legal presumption being made in favour of legitimacy. The force of presumptions of fact as evidence will vary with varying circumstances, and cannot well be fixed by decision. The Courts have properly presumed, in many cases, both marriage and acknowledgment; for to presume acknowledgment, and to consider treatment as tantamount to it, is virtually the same thing. The loss or destruction of evidence by time or design is as likely to take place with respect to acknowledgment as with respect to any other subject; and whilst matters of the highest import are capable of being inferred and are inferred from circumstances, it would be a merely arbitrary limitation of legitimate inference to exempt this one subject from its operation.

Mr. Campbell's conclusion that the respondent was the son of the late *Vizier* seems to their Lordships a just inference from the facts, nor does it seem to be at variance with the opinion of Mr. Fraser. Mr. Campbell treats this as the only question of fact in the case. But the issues distinguish properly between sonship and legitimate birth. Mr. Fraser keeps that distinction clearly before him in his judgment. Mr. Campbell, indeed, does not appear to have lost sight of it, but to have considered that he was entitled to presume the respondent's legitimacy, if co-habitation of his parents, and his birth from them at any time, whether before or after the marriage, were established as facts.

[1] 8 Moo. I. A., 159.

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Mr. Campbell does not question, in his judgment, the correctness of the opinion expressed by Mr. Fraser, that pregnancy commenced during the service. At that time co-habitation, in the sense of permanent intercourse such as takes place ordinarily between man and wife, is not proved to have existed between the late *Vizier* and the mother of the respondent. The evidence forbids the presumption that that kind of co-habitation commenced with her service, for a change in the treatment of her ensues when she is taken behind the *purdah*, and the antecedent relation, according to the evidence, was that of ordinary servitude. If pregnancy occurred, as Mr. Fraser is of opinion that it did, during that service, and when she was in the habit of going from the house freely into the *bazaar*, sexual intercourse then in that state between her and her master would not have the character of co-habitation of a permanent nature, such as under this head of law distinguishes concubinage from casual intercourse. If the subsequent marriage were adjudged to have relation back, by presumption of law, to the time of impregnation, then such a *præsumptio juris* would destroy altogether the difference between a law which admits to inheritance and a law which excludes from inheritance an antenuptial child. As a presumption of fact such a presumption is admissible, but then it must be subject to the application of the ordinary principles of evidence.

A subsequent marriage, so far from furnishing, as Mr. Campbell supposes, a ground for presuming a prior marriage, *primâ facie*, at least, excludes that presumption. Therefore, no ground exists for presuming a marriage antecedent to the *Mooltah* marriage which at some period or other was established between the *Vizier* and the mother of the defendant. Laying, then, this presumption aside, it appears to have been found in the Court below, on evidence which justified that finding, that pregnancy commenced during the time when the mother of the respondent was in service, and before she had the acknowledged *status* of a *Mooltah* wife. There was a marriage, but when it does not appear. It does not appear when the intercourse began which led to the birth, nor what was the nature of it, whether casual or of a more permanent character. It is obvious that the pregnancy might induce the desire to give the woman the reparation

of marriage. No difficulty is suggested about rendering these dates certain, which are now left utterly uncertain.

The treatment of the respondent by the *Vizier* appears for many years to have been that of a son by its father: this, however, is correctly treated by Mr. Fraser as inconclusive in itself, since a son conceived before marriage, and whom his father desired to recognize at some time as a legitimate son, would receive similar treatment. The treatment itself, therefore, does not suffice to dispel the darkness in which this case is left. The *onus* of proof lay on the respondent, on the pleadings in this cause, to prove his mother's marriage, and his own legitimacy as a child of that marriage. There has been no continuing treatment up to the time of the father's death; there has, on the contrary, been an absolute denial of paternity by the reputed father; there is no proof of any acknowledgment, but there is proof of treatment strong enough to prove legitimacy in an ordinary case, but of treatment not inconsistent with the *status* of a son conceived before marriage It is shown that the respondent did not receive all the honours which his brother received. This circumstance is much pressed against him by the appellants.

It may be, however, that the inferiority of his mother's condition, or his own later birth, caused the difference; or, on the other hand, the father may have postponed a legitimating acknowledgment, being as yet undecided as to his future treatment of him, and he may have waited to see how the youth conducted himself at puberty. The circumstance of some inferiority of condition having been continued down to the time of final rupture, to some extent supports the case of the appellants, that the respondent was not legitimate. Their Lordships are, therefore, of opinion, that the decision of the Commissioner is founded upon presumptions not warranted by the facts of the case, and in some degree upon a misconception of the authorities, and ought not to be allowed to stand. They will, therefore, humbly advise Her Majesty to reverse that decision, and to affirm the judgment of the Court of first instance. Considering, however, that the uncertainty as to the *status* of the respondent has been mainly caused by the acts of the deceased *Vizier*, the residue of whose estate will, in consequence of this decision, fall to the appellants, their Lordships are not disposed to subject the respondent to the costs in the Commissioner's Court, or to those of this appeal.

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NOTE.

This case establishes (1) that according to the Mahomedan Law the presumption of legitimacy from marriage follows the bed, and is not antedated by relation; (2) that a child really illegitimate may become legitimated by acknowledgment by the father, which may be express or implied, directly proved or presumed; and (3) that the denial of a son after an established acknowledgment is inoperative to cancel the effect of the previous acknowledgment, though supported by a deed of disclaimer and repudiation by the father. 'Acknowledgment' in its legal sense, under Mahomedan Law, requires something more than a mere recognition of paternity, for, in order to effectually confer the *status* of legitimacy, it must amount to an acknowledgment of an antecedent right, or, in other words, to a recognition of 'legitimacy as a son.' See *Abdul Razak* v. *Aga Mahomed Jaffer Bindanim* (I. L. R., 21 Calc., 666). The doctrine of acknowledgment has been held to have no application to cases in which there was an absolute bar or impediment to a valid marriage between the acknowledger and the mother of the child at the time of its birth. See *Liaqat Ali* v. *Karimunnessa* (I. L. R., 15 All., 396); *Aizunnissa* v. *Karimunnessa* (I. L. R., 23 Calc., 130). Acknowledgment of a child when duly made not only legitimatize the child, but has also the effect of giving to its mother the *status* of a wife, though there may be no evidence of any marriage. See *Mahatala Bibee* v. *Prince Hatimuzzuman* (10 C. L. R., 293).

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[*Reported in I. L. R., 21 Calc., 666.*]

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November, 11.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN.—Hadji Hussain, who was a member of a Mahomedan family belonging to the *Shia* sect and settled in Calcutta, traded as a merchant in Rangoon, made a fortune, and died there, married but without issue, in February, 1890. He left a will by which he purported to dispose of all his property. Hadji Hussain had an only brother of the full blood called Abdul Hadi, who died before him in March, 1886. He, too, was engaged in business in Rangoon for many years, but his career was less prosperous, and he returned to Calcutta a poor man some time before his death. The appellant claims to be the lawful son of Abdul Hadi by a Burmese woman, and as such to be the heir or one of the heirs of Hadji Hussain and entitled therefore to a share, in so much of his estate as he could not dispose of by will according to Mahomedan Law. For the purpose of the present case it is conceded that the appellant's claim is well founded, provided he can make out that he either is or is not entitled to be treated as the lawful son of Abdul Hadi. And the only questions on this appeal are these: (1) Has it been established that a valid marriage took place between Abdul Hadi and the appellant's mother, Mah Thai, who was undoubtedly a Buddhist when she met her alleged husband? (2) If proof of legitimacy is wanting, is there sufficient evidence of the legitimation of the appellant by acknowledgment?

The learned Recorder found that there was no marriage, holding upon the evidence that Mah Thai was not a convert to Mahomedanism. "It would, it seems to me," he observed, "be a mere mockery of the Mahomedan religion to say that there was a conversion, when there was not even a semblance of discussion on the subject, when no priest intervened, and when the utmost the alleged convert can say is, that she repeated prayers in a language she did not understand." Taking this view he thought it unnecessary to consider the evidence as to acknowledgment. No acknowledgment in his opinion could

[1] *Present*: LORDS HOBHOUSE, MACNAGHTEN, MORRIS, and SIR R. COUCH.

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confer the *status* of legitimacy upon the offspring of a Mahomedan and an unconverted Buddhist.

The learned counsel for the appellant took exception to the proposition upon which the Recorder's ruling seems to be based. It was a mistake, they said, to talk of conversion. No Court can test or gauge the sincerity of religious belief. In all cases where, according to Mahomedan Law, unbelief or difference of creed is a bar to marriage with a true believer, it is enough if the alien in religion embraces the Mahomedan faith. Profession with or without conversion is necessary and sufficient to remove the disability.

This criticism seems to be well founded. But the correction does not mend the appellant's case. There is nothing in the evidence tending to show that Mah Thai made any profession of the Mahomedan faith before or at the time of the ceremony which is said to have constituted marriage. Mah Thai was a witness for the appellant. She said that she knew nothing about the Mahomedan religion; and all her life she lived and worshipped as a Burmese. While co-habiting with Abdul Hadi she worshipped as he did; she repeated his prayers. But she added that she did not understand the meaning of a single word. In re-examination she said that she ceased to be a Buddhist during her co-habitation with Abdul Hadi from the time of her marriage.

The learned counsel for the appellant then invited their Lordships to embark on a wider inquiry. He proposed to examine and discuss the tenets of Buddhism with the view of showing that Buddhists come under the same category as Jews and Christians, with whom undoubtedly Mahomedans may intermarry. But it was obviously impossible for their Lordships to entertain the question in the present case. In the Court below it was common ground that such a marriage would be invalid, and there was therefore no evidence before the Court directed to the point.

In the next place it was urged that every presumption ought to be made in favour of marriage when there had been a lengthened co-habitation, especially in a case where the alleged marriage took place so long ago that it must be difficult, if not impossible, to obtain a trustworthy account of

what really occurred. There would be much force in this argument—indeed it would be almost irresistible—if the conduct of the parties were shown to be compatible with the existence of the relation of husband and wife. In cases like the present, conduct is a very good test, and a safer guide perhaps than the recollection or imagination of interested or biased witnesses. Mah Thai's own account of the way in which she was treated may be accepted as a fairly truthful story, considering her relationship to the claimant, and the fact that she is speaking of what occurred many years ago. The alleged marriage took place somewhere about the year 1854. If that date is correct, the connection between her and her alleged husband ceased in 1856, though Abdul Hadi did not leave Rangoon for good until more than twenty years afterwards. The marriage was proposed to her, she says, by a married sister of hers who was living in Rangoon, and who sent for her from her native village—a place called Mangi about half a day's journey off. She had already been married once, but that marriage was dissolved by mutual consent. Abdul Hadi was brought for her to see. She asked him if he would look after her and cohabit with her for a long time and he said he would. He came four or five times before the marriage. He said he would invite his male relatives, but he was not going to invite his female relatives. At the marriage some money and a ring were put into her hands as dower; with that part of the ceremony she seems to have been previously acquainted and to have been careful to insist upon it; and her consent to the union appears to have been given in due form. Then we have a picture of her married life. After the marriage she was not allowed to go out. She never saw any of her husband's female relatives. She did not know why they did not come to see her. She was not allowed to go to the mosque. She knew that wives of Mahomedans go to the mosque. She did not go because Abdul Hadi would not allow her. None of the female members of the Mahomedan community visited her, nor did she visit them. She never saw Hadji Husain or any of Abdul Hadi's male relatives. At the end of about a year and a half, when she was far gone in pregnancy, she went back to her mother's home in Maugi. She was confined there of a boy, whom she identifies as the present appellant. When

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the child was born she sent a message to Abdul Hadi to tell him of the birth. His answer was that he was busy and could not come. He sent, however, money for expenses, and he sent a messege to her parents to look after her. On two occasions afterwards he went to Mangi to visit her, returning to Rangoon in the evening. The first visit was about six months, the second about twelve months after the birth of the child. On the first occasion, Mah Thai says she saw Abdul Hadi alone, but nothing in particular was said. He wrote on a piece of paper a Mahomedan name for the child. Afterwards for fear it would be lost it was copied on a palm-leaf. The name was never used. The paper and the palm-leaf have disappeared. But Mah Thai says the name was "Abdul Razak," and that name has been reproduced or adopted in connection with this claim. On the second occasion, according to Mah Thai's statement, Abdul Hadi wanted to take the child to Rangoon, and wanted her to go with him. She said she was not well yet and that the child was not old enough. That was the last occasion on which Mah Thai saw Abdul Hadi. So far as appears she never even heard from him or of him afterwards. He was at that time apparently in prosperous circumstances, but he made no provision for her or for the child, and he left the child to be brought up as an unbeliever without so much as performing the primary rite of his religion. Mah Thai was very badly off, but she never applied to her alleged husband for assistance, nor did she make any attempt to see him, though she knew where he lived, and he had, she said, been kind to her while they co-habited together, and she liked her life with him. At the end of two years, or four years as she says in one place, she married a Burman by whom she had seven children. Then she was divorced and at the time of the trial she appeared as the wife or partner of a fourth consort.

Abdul Hadi continued to reside in Rangoon for a good many years, paying occasional visits to Calcutta. After a time he met with reverses and left Rangoon altogether. The last years of his life he spent at Calcutta, living as a pensioner on the bounty of his brother Hadji Husain.

The child was brought up by Mah Thai's parents who were in humble circumstances. As "Moung Hpay," which was the name they gave him, he lived till he was about thirty-five, with no

higher aims or aspiration than those of an ordinary Burmese peasant. When the heirs of Hadji Husain were wanted, he was discovered in the jungel at Mangi by some enterprising gentlemen at Calcutta who took the matter up as a speculation. They put him forward as the missing heir, and "Moung Hpay" has become an *alias* for "Abdul Razak." Their interest in the success of the claim is at least a guarantee that no stone has been left unturned to enable the case to be presented in as favourable an aspect as possible.

In the course of the argument Mr. Wheeler, the Judicial Clerk of the Privy Council, referred their Lordships to a case, decided by the Special Court of British Burmah in 1875. It is to be found at page 75 of Mr. Christopher's Collection of Circular Orders and Judgments, published under the authority of the Judicial Commissioner in 1881. The opinion delivered by the Court throws so much light on the practice relating to mixed marriages in Burmah, and the position held by the wife and children when there is a lawful marriage, that it will not be out of place to quote a passage from it. After stating as a matter apparently not open to controversy that in order to constitute a valid marriage between a Mussulman and a Burmese woman, the woman must first apostatize and embrace Islam, the judgment proceeds as follows :—

"In a country like this where a large number of Mahomedans from other countries have taken up their residence, and in very many cases their permanent abode, and when the natives have no race prejudices against alliances with foreigners, and whose religion offers no impediment to such, we find these mixed marriages everywhere existing among them, which have been duly celebrated according to Mahomedan rites; the wife having previously renounced her own religion and embraced that of her husband. Such an alliance is not regarded by either party as one of a temporary character, or in any way partaking of concubinage such as the *liaisons* which at one time prevailed here between Europeans and the women of the country, but as a formal and a binding marriage. It only requires a short experience of this country to know that these marriages are regarded amongst the Mahomedan community as being of as binding a character, and as conferring on the wife as honourable a position in the family as if she had been of Mahomedan descent, for she holds the same

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position as the husband's other wife does, if he happens to have another. The offspring likewise of these marriages are brought up in the Mahomedan faith, and are acknowledged by their father as his legitimate children, and at his death share his property as such. The Burmese wife also takes the wife's share, if she is the only one, or divides it with the other or others as the case may be; and these rights, both as regards the children and the wife, are recognized by our Courts."

If this be a correct description of the position of a Burmese woman lawfully married to a Mahomedan settler in Rangoon, it certainly would require a very violent presumption in favour of marriage to enable the Court to hold that Mah Thai was lawfully wedded to Abdul Hadi. It is tolerably obvious that neither Abdul Hadi nor Mah Thai regarded the ceremony which preceded their co-habitation in the light of a lawful and binding marriage. On this point their Lordships are glad to find themselves entirely in accord with the Court below.

The only question remaining for consideration is the question of acknowledgment, with which the learned Recorder dealt in rather a summary way. The learned counsel for the respondent did not deny that Abdul Hadi might have married Mah Thai, as no doubt he might have done if she had embraced Islam, nor did they contend that the intercourse between Abdul Hadi and Mah Thai was of such a character as to prevent the possible legitimation of the offspring. Their contention was that there was no acknowledgment in the legal and proper sense of the word although there may have been an admission of paternity.

The learned counsel for the appellant cited various texts, which, taken apart from the context, would seem to show that any admission of paternity, though made casually and not intended to have a serious effect, would be sufficient to confer the *status* of legitimacy. It is not in their Lordships' opinion necessary to examine these ancient authorities, or to inquire how far they are applicable to a state of society very different from that which existed at the time when they were promulgated. Their Lordships are bound by the decision of this Board which is clear upon the point. The question arose in the case of *Ashruff-ood-dowla Ahmed Hossein* v. *Hyder Hossein Khan*.[1] There it was contended that the claimant, who was defendant in

[1] 11 Moo. I. A., 94.

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the suit and respondent on the appeal, had been acknowledged by his putative father. The fact of acknowledgment was denied by the appellant, and a deed of repudiation was set up, in which the father expressly repudiated the claimant as his son. An issue was framed in these terms: "Has the deed of repudiation the effect of cancelling previous acknowledgment of defendant's legitimacy, if such were made?" In the course of their judgment (p. 104 of the report) their Lordships comment upon that issue. It was, they said, "very correctly framed. It substitutes, for the ambiguous word 'sonship' which might include an illegitimate son, the word 'legitimacy,' and uses the word 'acknowledgment' in its legal sense, under the Mahomedan Law, of acknowledgment of antecedent right established by the acknowledgment on the acknowledger, that is, in the sense of a recognition, not simply of sonship, but of "legitimacy as a son." It is clear that it is in that sense that the term, "acknowledgment," is used in a later passage of the judgment which has often been cited, where their Lordships say "a child born out of wedlock is illegitimate; if acknowledged, he acquires the *status* of legitimacy. When, therefore, a child really illegitimate by birth becomes legitimated, it is by force of an acknowledgment, expressed or implied, directly proved or presumed.

It cannot be contended that there was any acknowledgment of legitimacy in the present case. The so-called acknowledgment, even if the evidence on the part of the appellant is accepted as true in every particular, comes to nothing more than an admission of paternity which was not intended to have the serious effect of conferring the *status* of legitimacy. A witness is produced who says he accompanied Abdul Hadi on his second visit to Mangi, and that Abdul Hadi told him that he was going to see his son. And there is some other evidence to the like effect. Then there is some evidence that Abdul Hadi, though he had no property, left a will, bequeathing everything to his brother Hadji Husain, in which he mentioned that he had offspring in Burmah. According to one witness he named the offspring as "Abdul Razak," and expressed a wish that his brother should give him "something." The will it seems was sent to Hadji Husain, but it is not forthcoming, nor was it acted upon. Assuming however every word that is said about it to be perfectly true, the evidence falls very far short of such an

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acknowledgment as would confer the *status* of legitimacy upon an illegitimate child.

Their Lordships, therefore, in the result agree with the learned Recorder in thinking that the appellant's claim fails, and they will humbly advise Her Majesty that the appeal must be dismissed with costs.

Appeal dismissed.

BAKER ALI KHAN
v.
ANJUMAN ARA BEGAM.[1]

SADIK ALI KHAN
v.
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[*Reported in L. R., 30 I. A., 94; I. L. R., 25 All., 236.*]

1903.
March, 4.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON.—The suit out of which these consolidated appeals arise relates to the devolution of a part of the property of Haji Begam, a Mahomedan lady who died at a very advanced age on January 19, 1894. She was a daughter of a former King of Oudh, and the family to which she belonged are *Shiahs* and governed by the *Shiah* law.

Haji Begam was married to Ikhtidar-ud-daulah, who died in 1883, and the issue of that marriage was a son, Zaka-ud-daulah, who died about forty years ago, leaving issue by three different mothers, Farzana, Haidri, and Jafri. By Farzana he left a son, Fazl Ali, who is dead without issue, and a daughter, Najmunnissa, who died leaving a son Baker Ali, the first appellant. By Haidri, Zaka-ud-daulah left a daughter, Shazada, since deceased, whose daughter is the first respondent. By Jafri he had a daughter, Wilayeti, who died leaving a son, the second respondent.

On July 10, 1890, Haji Begam executed a document, the legal effect of which is in controversy, under which it is contended by the appellants that certain portions of Haji Begam's estate have become *waqf* devoted to religious purposes. Under this document Sadik Ali, the second, and Baker Ali, the first appellant, were to be executors and *mutawallis*; and on January 21, 1895, Sadik Ali alone obtained probate of the document as a will, Baker Ali being a minor.

On June 8, 1895, the now respondents filed the present suit against the appellants in the Court of the Additional Civil Judge of Lucknow. They alleged that they were entitled as heirs of Haji Begam to two-thirds of the property, which should pass to

[1] *Present*:—LORD MACNAGHTEN, LORD LINDLEY, SIR ANDREW SCOBLE, SIR ARTHUR WILSON, and SIR JOHN BONSER.

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her heirs, while they admitted that the other third passed to the first appellant, Baker Ali, as their co-heir. And they claimed to have it established that the alleged will of July 10, 1890, was invalid as against them as heirs, and to recover two-thirds of the property affected by it.

The Additional Civil Judge, who heard the case, held that the plaintiffs, the now respondents, had failed to prove that they were heirs of Haji Begam. As to the second question, he held that the will was not valid against heirs; but as he had found that the respondents were not heirs, he dismissed their suit with costs. Against this decision an appeal was brought to the Court of the Judicial Commissioner of Oudh. The two Additional Judicial Commissioners, who heard the appeal, differed from the first Court on the first question, and held that the now respondents were heirs of Haji Begam, while they agreed with the first Court as to the effect of the will; and they accordingly reversed the decree of the first Court, and made a decree in favour of the now respondents on all points. Against that decree the present appeals have been brought.

With regard to the question whether the respondents are heirs of Haji Begam, their case is that their mothers Shazada and Wilayeti were the legitimate children of Zaka-ud-daulah, inasmuch as the respective mothers of those ladies, Haidri and Jafri, were his wives, married to him in the *mutai* or temporary form, which is accepted as valid by the *Shiah* law.

On the other side it was alleged that Haidri and Jafri were both sisters of Farzana, the first wife of Zaka-ud-daulah, and that Farzana was living at the time of the supposed marriages with Haidri and Jafri, so that there could have been no lawful marriages with them. Both Courts in India have found that the facts necessary to support this contention are not proved; and their Lordships were not asked to review these findings.

It was also urged in India as matter of law that a child of a *mutai* marriage is not legitimate without proof of acknowledgment by the father; but this contention was abandoned before their Lordships.

The case that remains on behalf of the appellants is that neither Haidri nor Jafri was married to Zaka-ud-daulah, that they were mere slave girls, and that their children by Zaka-ud-daulah, were the fruit of illicit intercourse with him. The issue thus

raised, which is one purely of fact, is the one upon which the Courts in India have differed.

There is no direct evidence of either marriage—a point upon which the Courts in India have not laid much stress, and under the circumstances their Lordships think rightly. There is no evidence of acknowledgment of the children by their father—a point which is of less importance than it might otherwise have been by reason of the fact that, when he died the two children whose *status* might have been affected were very young.

But marriage and legitimacy may, of course, be proved in such cases by other means. In the present case the most important evidence in favour of legitimacy consists of a series of statements made by Haji Begam herself which were admitted as evidence by the Courts in India, and their Lordships think rightly. It appears that Haji Begam was in receipt of a pension from Government known as a *wasika*; and, according to the practice in force, such pensioners were from time to time called upon to make statements to the *Wasika* Office, a department under Government, as to who were their heirs. A series of such statements by Haji Begam extending from 1860 to 1890 is in evidence. It also appears that from time to time Haji Begam was asked by the *wasika* officers to furnish explanations of the statement submitted by her, and several letters in reply to such inquiries have been produced. In these documents, beginning with that of 1860 down to and including that of 1885, Haji Begam speaks of the line of Haidri and that of Jafri as heirs in exactly the same terms as of the line of Farzana, whose legitimacy is not questioned; she speaks of Shazada and Wilayeti as her grand-daughters and as daughters of Zaka-ud-daulah; she speaks of Shazada, at a time before Wilayeti was born, as daughter of a *mutai* wife, coupling her as such with Najmunnissa; and she speaks of Jafri as a *mutai* wife still alive. In her statement of 1890, it is true, she omitted the respondents from her list of heirs. In her letter of explanation she gave her reasons for this, which do not seem to be inconsistent with her previous statements of fact, but which were not accepted as satisfactory.

Their Lordships think that the Appellate Court was right in giving great weight to these documents. They come from a public office and bear indorsements which exclude all doubt of their genuineness; they contain the statements of one who had

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the best means of knowledge, made at times when no such controversy as the present can well have been in contemplation; and the statements are such that, if true, they seem to conclude this part of the case.

Ikhtidar-ud-daulah, Haji Begam's husband, who died in 1883, also appears to have been in receipt of a *wasika*, and when he died a question arose as to who should succeed to it. A petition was presented jointly by Fazl Ali, Shazada, and Wilayeti describing the deceased as their grandfather, and asking that his pension should be allotted to them. This petition, their Lordships think, has been duly proved, and it seems to be by necessary inference a statement by Fazl Ali, and a statement against his own interest, that the title of his two cousins was as good as his own. And so far it confirms the far more important statements of their grandmother.

On the same occasion inquiry was made from the *Wasika* Office of a number of persons as to the heirs of the deceased man; and the answers then obtained from them with the evidence of the same persons at the trial have been received. This evidence, however, is of very inferior value to that previously referred to, for it consists at best of hearsay reports of statements said to have been made by members of the family. The learned Judges, who heard the appeal in India, do not appear to have attributed much importance to it, and their Lordships do not rely upon it for the conclusions at which they have arrived.

In support of the respondents' case reliance was further placed upon the treatment of Haidri, Jafri, and the descendants of each in Haji Begam's family, which, it was argued, was inconsistent with illegitimacy. In dealing with this branch of evidence their Lordships will only notice those matters as to which there is no controversy of fact.

Haidri and Jafri, and their children and grand-children, were always treated as members of Haji Begam's family. Haji Begam made an allowance to each of those ladies for the maintenance of herself and her children. Haji Begam provided for the marriages of the children, and such marriages took place with members of the family; thus the second respondent, Wasi Ali, is married to the daughter of the second appellant, Sadik Ali, who is himself a sister's son of Haji Begam. Lastly, in the will of Haji Begam, the effect of which will have to be considered in another

connection, when making provision for the anniversary religious ceremonies in commemoration of the deaths of certain ladies, the testatrix places Shazada in the same list, not only with Najmunnissa, but with the testatrix herself and her mother, and provides alike for all.

To meet the case of the respondents, reliance has been placed upon two lines of defence. *First*, the learned counsel for the appellants has sought to impugn each piece of evidence in detail, and in particular has examined and criticised every document relied upon, with the object of shaking its credit and minimising its effect. Their Lordships have given full weight to these criticisms, but they have failed to create any doubt in their Lordships' minds as to the trustworthiness or as to the meaning and effect of the documents to which, as already indicated they attach importance.

The appellants relied *secondly* upon evidence given at the trial, by witnesses of each side, the effect of which is said to have been to shew that in the family to which Haji Begam belonged very lax views as to sexual relations prevailed, and that, for special purposes at least, legitimate and illegitimate children were treated alike. This evidence seems to have had great weight with the Court of first instance.

It is unnecessary to consider what effect ought to have been given to this evidence if the case of the respondents had rested only on evidence of treatment in the family, for this is not the case. The statements and letters of Haji Begam and the petition to which Fazl Ali was a party related, not to social status or family recognition, but to rights of inheritance. And the evidence in question can have no bearing upon statements on that subject. Certainly, too, it can have no tendency to neutralize the express assertions of Haji Begam that Shazada was the daughter of a *mutai* wife, and that Jafri was a *mutai* wife.

For these reasons their Lordships are of opinion that the Additional Judicial Commissioners were right in holding that the respondents are co-heirs with Baker Ali of Haji Begam, and are as such entitled to two-thirds of the property descending to her heirs.

The second inquiry involved in these appeals is as to the validity and effect of the alleged will of July 10, 1890.

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That document commences with the usual invocation and reference to the uncertainty of life, and proceeds :—

"I deem it proper to dispose of by will a third part of my movable and immovable property and that of cash in the way of God for ever, in order to improve my condition in the next world, and to make arrangements thereof in my lifetime that there may arise no quarrel and dispute after my demise, I.....do hereby set apart out of my entire property a third part as detailed below, valuing this date Rs. 54,100 Queen's coin, for the expenses of *Imambara*, etc., and having appointed two executors and *mutawallis* (superintendents), named Nawab Sadik Ali Khan and Nawab Baker Ali Khan, make my will with the following provisos :—

"(1) That having placed one *pucca Imambara* owned and possessed solely by me and free from all transfers with two *pucca Mahal Sarais*, compound and *pucca* shops, situate in Mohallah Pir Bokhara and Lohia Bazar in the Lucknow city, and bounded as under, together with all furniture and articles intended for mourning purposes in the month of *Moharram* and belonging to the said *Imambara*, the detail whereof is given below, under the charge of the aforesaid *mutawallis* (superintendents) I set apart for the perpetual expenses of *Imambara* four promissory notes amounting to Rs. 54,100, numbered as follows : [The numbers are given, as are the boundaries of the *Imambara*, and a list of furniture and other articles]."

Para 2 : "That the monthly and annual expenses of the *Imambara*, mentioned above, shall ordinarily be as detailed below, and the said executors shall have no power at any time to decrease or increase expenses." [The expenditure is here prescribed.]

Para. 3 provided for the minority of Baker Ali :

"(5) That Nawab Sadik Ali Khan and Nawab Baker Ali Khan will continue to act as superintendents and managers during their lifetime, and after their demise their descendants, generation after generation, will hold the same office. If (God forbid) any of their descendants may turn out of bad conduct and prove incompetent for the office, the British Government and Mujtahid-ul-asr (religious leader for the time) conjointly shall appoint two fit persons to act as superintendents for the *Imambara*, and they shall be invested with the afore-mentioned powers. Any of the superintendents, desiring to renounce

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his office, can do so after appointing a new man of his own choice.

"(7) The income arising from the shops and houses shall be kept with the superintendents, and after defraying miscellaneous expenses of the *Imambara*, the surplus shall be distributed among *Saiyeds*.

"(8) If, perchance, both the executors or their descendants commit embezzlement and misappropriation, subvert the arrangements stated above, or raise any dispute or quarrel about the same, the Magistrate of the district shall, in that case, institute an inquiry, and shall have power to appoint other two persons in their place and act as directed above.

"(9) The executors shall have no power to make any sort of transfer by mortgage or sale, in respect of the above-detailed promissory notes, at any time.

"(10) That the said executors shall have power to indorse the notes after my demise in execution of the will, and during my life-time I shall receive the interest and defray the expenses of the *Imambara*; nay, so long as I live, all sorts of property in respect whereof the will has been made shall remain in my absolute proprietorship. The expenses incurred after my death in obtaining a certificate, in conducting suits in the event of dispute arising between heirs or in seeking any other relief, shall be met from the interest arising from the promissory notes, but in case of insufficiency the additional expenses shall be paid by the superintendents by deducting from such items as they think proper, so that they may sustain no personal loss. The superintendents are further empowered to make a proportionate deduction in all the items of annual expenses, if by chance any diminution be made by Government in the present rate of interest.

"(12) In the said *Imambara* corpses will be interred with the consent of the above-named superintendents.

"(13) If after the execution of this will, which has taken place with my free will and consent, I execute another will or codicil revoking this will and disposing of the property detailed above, the latter one should be regarded by the Court as null and void."

In paragraph 14 it is said: "I have written these few lines as a will and I have got it registered."

Their Lordships think it clear that this document is a will, and that its expressed intention is to convey the property with

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which it deals, on the death of the testatrix, to the *mutawallis*, the appellants, as *waqf* for the purposes specified; and effect must, of course, be given to that intention if the law admits of it.

It was held, however, by both the Courts in India that under the *Shiah* law, unlike the *Sunni* law, a *waqf* cannot be created by will. And though it is not so stated, there can be little doubt that the Courts, in so holding, acted out of deference to the decision of a Full Bench of the High Court of the North-Western Provinces in 1892 in the case of *Agha Ali Khan* v. *Altaf Hasan Khan*,[1] in which the law appears to have so laid down. Their Lordships have therefore to consider whether the High Court, whose reasons were most fully expressed by Mahmood, J., were right in deciding, as they seem to have done, in that case that under *Shiah* law a *waqf* cannot be created by will, though the result can be secured indirectly by making a gift of property with a direction to the donee to create the *waqf* desired.

In considering this question, their Lordships must start with certain propositions as to which there is no doubt. A *Shiah* can make a gift. He can make a gift of the kind known as a *waqf*. He can make a will and can, speaking generally, give a gift by will. It would seem to follow as a logical inference that he can make a *waqf* by will, as can a *Sunni*. And in substance and effect, it is admitted that he can indirectly do so. It is admitted that he can make a gift of property by will and require the donee to apply it as *waqf*; the contention is that the testator, though he can do this, cannot himself directly create the *waqf* by his will. The distinction, which has been taken, is thus one of form, not of substance; and it is one which has little to commend it unless their Lordships are constrained by authority to accept it.

The only judicial authority prior to 1892 on the present point cited in argument is the case, in 1836, of *Wasiq Ali Khan* v. *Government*,[2] mentioned by Mahmood, J., at p. 449 of his judgment, in which effect was given to a testamentary *waqf* of a *Shiah*. Mahmood, J., suggests that the Sudder Court wrongly applied *Sunni* law to the case, and it may be so; but it may equally well be that it was not then thought that there was any difference on this point between the two Schools of Mahomedan Law. The learned Judge suggests also that until the case before

[1] I. L. R., 14 All., 29.

[2] 6 S. D. A., 110.

this Committee in 1841, *Raja Deedar Hossein* v. *Ranee Zuhoor-oon-Nissa*,[1] *Shiah* law was not consistently applied to *Shiah* cases. And again he may be right, though the language used in the case just cited [2] hardly supports him in this view. The case before the Sudder Court is not a strong authority, but so far as it goes it lends support to the more liberal view upon the question under consideration. The case of *Prince Suleman Kadr* v. *Durab Ali Khan*,[3] decided in 1881, shews at least that in the same family to which Haji Begam belonged a testamentary *waqf* was created and apparently went unquestioned.

On the other hand, the only support for the doctrine that a *Shiah* cannot directly make a *waqf* by will is to be found, not in any positive statement by any of the recognised authorities on *Shiah* law, but in the reasoning of Mahmood, J., upon a number of more or less ambiguous texts, which their Lordships have considered with all the respect due both to the opinion of so eminent a Mahomedan lawyer, and to the concurrence of his colleagues in the Full Bench in his views.

In the earlier and more important part of his judgment the learned Judge deals with texts, many of them of undoubted authority, which purport to lay down the essentials of a *waqf* under *Shiah* law, namely, that a *waqf* is by definition a contract involving offer and acceptance, that as essential conditions there must be delivery of seisin, that the gift must be unconditional, and that nothing must be reserved for the settlor.

The last two conditions may, their Lordships think, be disregarded for the present purpose. If a *waqf* may be made by will speaking from the death, there is no condition and no reservation in such a case as the present. Mahmood, J.'s reasoning turns on the definition and the first condition; he thinks his conclusion necessarily follows from them, and this is the really important part of his reasoning on which the whole depends. The argument of the learned counsel for the respondents was the same: he contended that if you accept the texts, as you must do, you are bound to accept their logical consequences.

[1] 2 Moo. I. A., 441.
[2] 2 Moo. I. A., pp. 477, 478.
[3] L. R., 8 I. A., 117.

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In *Abul Fata* v. *Russomoy Dhur Chowdhry*,[1] in the judgment of this Committee delivered by Lord Hobhouse, the danger was pointed out of relying upon ancient texts of the Mahomedan Law, and even precepts of the Prophet himself, of taking them literally, and deducing from them new rules of law, especially when such proposed rules do not conduce to substantial justice. That danger is equally great whether reliance be placed upon fresh texts newly brought to light, or upon fresh logical inferences newly drawn from old and undisputed texts. Their Lordships think it would be extremely dangerous to accept as a general principle that new rules of law are to be introduced because they seem to lawyers of the present day to follow logically from ancient texts however authoritative, when the ancient doctors of the law have not themselves drawn those conclusions.

There are, moreover, special difficulties in the way of accepting the inference drawn by Mahmood, J., from the definition and conditions of a *waqf* as laid down in the ancient *Shiah* texts. The more important of those texts have long been accessible to all lawyers. In none of them does the author himself draw the conclusion that the creation of a *waqf* by will is excluded. Nor has that conclusion been drawn by any modern writers, who have collected and translated such texts, though in other respects the difference between the *Shiah* and the *Sunni* law of *waqf* has been pointed out.

And beyond these negative indications their Lordships find an important guide for determining the light in which the definition and condition in question should be regarded, as bearing upon the testamentary creation of a *waqf*, in the closely analogous case of a gift. A gift like a *waqf* is defined as a contract requiring offer and acceptance, and delivery of seisin is a condition of the validity of a gift as of a *waqf*. Yet from the time of the earliest *Shiah* authorities until now it has always been clear that *Shiahs* can make a gift by will. The most authoritative work of that School (the one translated by Baillie) contains a chapter on wills. This Committee, in *Nawab Amin-ood-Dowlah* v. *Syad Roshun Ali Khan*,[2] affirmed their validity. And the distinction drawn by Mahmood, J., is itself based on the legal efficacy of a gift by will. Their Lordships think that, in applying the same

[1] (1894) L. R. 22 I. A., pp. 86, 87.
[2] (1851) 5 Moo. I. A., 199.

definition and condition to the case of a *waqf*, it is safer to follow this analogy than to draw the logical conclusions which may seem to an acute modern dialectician to follow from the words of the old texts.

Another part of the judgment of Mahmood, J., deals with texts which seem to have little bearing upon the present question. They discuss the consequences of the death of a settlor before delivery of seisin, and they relate apparently, not to wills, but to cases in which a man has made a deed of *waqf* intended to operate *inter vivos*, but has died before he could complete the transaction by delivery.

The last part of the judgment of the learned Judge cites texts bearing somewhat more closely upon the present question. But there is no unanimity among them; the learned Judge has to choose between texts which he thinks are of various degrees of authority, and it is to reconcile those which he accepts that he adopts his distinction between the direct and indirect creation of a *waqf* by will. Their Lordships doubt whether the learned Judge would himself have relied upon such texts as sufficient to support his conclusion had he not already been satisfied of its correctness by the reasoning of the earlier part of his judgment, in which their Lordships are unable to concur.

For the foregoing reasons their Lordships are of opinion that the rule of law laid down by the Allahabad High Court, and followed by both the Courts in India in the present case, to the effect that a *Shiah* cannot create a *waqf* by will, is unsound.

Their Lordships thus differ from the first Court upon both the broad issues raised in the case, while they agree with the Appellate Court upon the first and differ upon the second. But the result is that the suit of the plaintiffs, the present respondents, fails and was rightly dismissed by the first Court, though not upon the right grounds.

Their Lordships will humbly advise His Majesty that the decree of the Judicial Commissioners' Court should be set aside with costs, and that of the Additional Judge of Lucknow affirmed. The respondents will pay the cost of these appeals.

NOTE.

This case decides that a *Shiah* can create a *waqf* by a will, and thus over-rules the decision of a Full Bench of the Allahabad High Court in the case of *Agha Ali Khan* v. *Altaf Hasan Khan* (I. L. R., 14 All., 429).

GOBIND DAYAL
v.
INAYATULLAH.

BRIJ MOHAN LAL
v.
ABUL HASAN KHAN.[1]

[*Reported in I. L. R., 7 All., 775.*]

1885.
February, 9.

The following judgments were delivered by the Full Bench :—

MAHMOOD, J.—These two connected appeals have been referred together to the Full Bench as presenting the same question for determination by the Court, and I have been requested by my learned brethren to deliver my judgment first. The question is exactly the same as that which was raised in *Sheikh Kudratulla* v. *Mohini Mohan Shaha*.[2] The order of reference in F. A. from Order No. 135 of 1883, after alluding to certain rulings of this Court and of the Calcutta Court, and considering the great importance of the points of law involved, refers to the Full Bench the following question :—"In a case of pre-emption, where the pre-emptor and the vendor are Muhammadans and the vendee a non-Muhammadan, is the Muhammadan Law of pre-emption to be applied to the matter, in advertence to the terms of s. 24 of Act VI of 1871?" This question presents itself to my mind in two aspects. The *first* is, whether s. 24 of the Bengal Civil Courts Act renders it imperative on this Court and the Courts subordinate to it to administer the Muhammadan Law in cases of this nature? The *second* is, what is the Muhammadan Law of pre-emption in regard to the point before us?

The first of these questions depends upon the construction to be placed on s. 24 of the Bengal Civil Courts Act (VI of 1871). In discussing this, I shall be within the recognised rules of interpretation in reviewing shortly the history of the particular section in question. It is not a new provision of the law. The principle which it embodies was recognized by the British rule at the outset of its authority in this country. The history of the recognition

[1] *Present* :—Sir W. COMER PETHERAM, Kt., Chief Justice, Mr. Justice OLDFIELD, Mr. Justice BRODHURST, Mr. Justice MAHMOOD, and Mr. Justice DUTHOIT.

[2] 4 B. L. R., 134.

of this principle has been accurately traced by a learned Judge of the Indian Bench, Mr. Justice Field, at pages 169-171 of his valuable work on the "Regulations of the Bengal Code." The legislation there described began with the Regulation of the 21st August, 1772, which laid down the exact scope of the application of the Hindu and Muhammadan Laws, and the omission to provide for cases which did not fall within the rule was supplied by the Regulation of the 5th July, 1781, which directed that "in all cases for which no specific directions are hereby given, the Judges do act according to justice, equity, and good conscience." The latter part of the rule was reproduced in s. 21 of Regulation III of 1793, and the former part of the rule was re-enacted in s. 15 of Regulation IV of 1793, which laid down that "in suits regarding succession, inheritance, marriage, and caste, and all religious usages and institutions, the Muhammadan laws with respect to Muhammadans, and the Hindu laws with regard to Hindus, are to be considered as the general rules by which the Judges are to form their decisions." To the two-fold rule so laid down, addition was soon after made by Regulation VIII of 1795, which enacted that "in cases in which the plaintiff shall be of a different religious persuasion from the defendant, the decision is to be regulated by the law of the religion of the latter, excepting where Europeans or other persons, not being either Muhammadans or Hindus, shall be defendants, in which cases the law of the plaintiff is to be made the rule of decision in all plaints and actions of a civil nature." The principle of applying the native laws according to the religious persuasions of the parties to the suit, and, with reference to the accident of their being arrayed as parties-plaintiffs or parties-defendants in the litigation, is an illustration of the simplicity which marks some of our oldest legislative enactments. The principle must have given rise, not only to confusion, but in some cases to positive injustice; whilst in cases where every one of the persons arrayed as parties to the suit belonged to a different persuasion, the application of the rule must have been impracticable. The experience of some years seems to have brought this difficulty into prominence, for we find that the next important piece of legislation on the subject was Regulation VII of 1832, s. 9 of which, while affirming the rules to which reference has already been made, added a new proposition as an injunction to the Courts administering justice

1885.

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under the East India Company. The section ran thus:—"It is hereby declared, however, that the above rules are intended and shall be held to apply to such persons only as shall be *bonâ fide* professors of those religions at the time of the application of the law of the case, and were designed for the protection of the rights of such persons,—not for the deprivation of the rights of others. Whenever, therefore, in any civil suit, the parties to such suit may be of different persuasions, when one party shall be of the Hindu and the other of the Muhammadan persuasion; or where one or more of the parties to the suit shall not be either of the Muhammadan or the Hindu persuasion, the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of those laws, they would have been entitled. In all such cases, the decision shall be governed by the principles of justice, equity, and good conscience, it being clearly understood, however, that this provision shall not be considered as justifying the introduction of the English or any foreign law, or the application to such cases of any rules not sanctioned by those principles."

Such was the law at the time when the celebrated case of *Sheikh Kudratulla* v. *Mohini Mohan Shaha* [1] was decided by the Full Bench of the Calcutta High Court. Since that time, however, the provisions, which I have referred to, have been repealed by the Bengal Civil Courts Act (VI of 1871), and the question is now governed by s. 24 of that Act, which provides that "where in any suit or proceeding it is necessary for any Court under this Act to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution, the Muhammadan Law in cases where the parties are Muhammadans, and the Hindu Law in cases where the parties are Hindus, shall form the rule of decision, except in so far as such law has, by legislative enactment, been altered or abolished. In cases not provided for by the former part of this section, or by any other law for the time being in force, the Court shall act according to justice, equity, and good conscience." It is this section with which we are directly concerned in the present case, and I have referred to the old Regulations because, without reference to them, the law in its existing form can scarcely be properly interpreted.

[1] 4 B. L. R., 134.

The question then arises:—Is pre-emption a "religious usage or institution" within the meaning of the section? It cannot come within any of the other matters enumerated. A similar question was considered by a Full Bench of this Court in connection, not with the subject of pre-emption, but with that of gift under the Muhammadan Law. This was in the case of *Shamshool-nissa* v. *Zohra Bibi*,[1] in which the Court was divided in opinion, Spankie, J., differing from the other three Judges, Stuart, C. J., Pearson, and Jardine, JJ. The majority of the Court were of opinion that under s. 24 of Act VI of 1871, the Muhammadan Law is not strictly applicable to questions relating to gifts, but it is equitable as between Muhammadans to apply that law to such questions. I shall presently refer to the dissentient judgment of Spankie, J., for whose opinion upon such questions I have always entertained the greatest respect. Shortly after this, the Full Bench case of *Chundo* v. *Hakeem Alim-ood-deen*[2] was decided. That repeats the same principle, but is still more to the point, because it relates to pre-emption, and the majority of the Court held that, under s. 24 of Act VI of 1871, the Muhammadan Law is not strictly applicable in suits for pre-emption between Muhammadans, not based on local custom or contract, but it is equitable in such suits to apply that law. Here again Spankie, J., adhering to the opinion formerly expressed by him, dissented from the opinion of the majority of this Court.

Now, as to the two Full Bench cases, the opinion of the majority of this Court in regard to gift and pre-emption was that, although the Court was, as a matter of fact, bound to apply the rules of Muhammadan Law, it was so bound not by the strict terms of the first part of s. 24, but by the rule of justice, equity, and good conscience, referred to in the second part. Spankie, J., on the other hand, held that the law of pre-emption, as of gift, must be applied under the first part of the section, being included under the head of "religious usage or institution." In other words, the majority thought that they might properly let *their* notions of justice, equity, and good conscience prevail over those of the Muhammadan Law, while Spankie, J., held that the Court was absolutely bound to follow that law. With

[1] N.-W. P., H. C. R., 1874, p. 2.
[2] N.-W. P., H. C. R., 1874, p. 28.

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all due respect to the majority in that case, I cannot help observing that the view expressed by Spankie, J., is the only one which could be accepted by a Muhammadan lawyer sitting here as a Judge. That learned Judge did not consider the question in any limited or superficial manner. He carefully and thoroughly, dealt with the circumstances under which the Muhammadan Law is binding upon the Courts, and referred to the opinions expressed by Muhammadan writers, and, among others, to a work by my father, Syed Ahmed Khan Bahadur. He observed :—"It is contended that we cannot connect 'religious usage or institution' with cases of gift, and that it would be straining the ordinary acceptation of the meaning of the words to do so. But I am not satisfied that this is the case. 'Usage' ordinarily means use or long continued use, custom, practice. 'Institution' means the act of establishing, establishment, that which is appointed, prescribed or followed by authority, and intended to be permanent. One of the four senses in which the word 'institution' is used technically extends to laws, rites, and ceremonies, which are enjoined by authority as permanent rules of conduct or of government. So far, then, as the ordinary meaning of the word goes, I do not see anything anomalous in the suggestion that judicial questions regarding gifts may be determined according to religious usage, which includes prescription as well as custom. So if laws have been enjoined by authority to govern questions of gift and were intended to be permanent, the word 'institution' may not be misapplied. It is to be remembered that Hindu and Muhammadan Laws are so intimately connected with religion that they cannot readily be dissevered from it. As long as the religions last, the laws founded on them last. Mr. Baillie has noticed this, and he remarks that Muhammadans in the provinces are more in the habit of regulating their dealings with each other by their own law, and to disregard it would be inconsistent with justice, equity, and good conscience; and, this being so, he assumed that the Judges have been obliged to extend the operation of the Muhammadan Law beyond the cases to which it is strictly applicable under the Regulations. He quotes Macnaghten in his preface to the 'Principles of Muhammadan Law,' as having arranged the order of cases in which this law has been applied by our Courts."

The learned Judge then proceeds to consider the cases in which Baillie holds that the Muhammadan Law perforce applies. Then he goes on to say :—" Questions then, of gifts, pre-emption, etc., if not governed by Muhammadan Law as expressed clearly in the text of the Koran, are controlled by religious usages founded on, or institutions enjoined by the oral law or sayings of the Prophet." And in conclusion :—" I am of opinion that the proper answer to the reference is, that the suit, giving rise to it, should be determined by that law (*i.e.*, the Mahammadan Law), and without reference to the principles of justice, equity, and good conscience."

Now, although the decision of the majority in that case is binding upon me, I regard the question as virtually re-opened by this case, and I must therefore confess that I am unable to agree with it, and my reasons are these :—In the first place the Muhammadan Law of gift or pre-emption either is or is not law in the proper sense, by which I mean a rule of conduct binding upon the subjects of the State, and upon the Courts which the State has established. No doubt the opinion of the learned Judges leads to the same result. They also apply the Muhammadan Law, not *as a law*, but only as a rule enjoined by equity. In any view, equity cannot, so to speak, invent rules by which rights are to be determined : it must follow and be guided by rules which are law in the strict sense. This is implied by the maxim *æquitas sequitur legem* ; and the "*lex*" to be followed must mean the law of the land in which equity is administered, and not any foreign law or any system not obligatory on the Courts. If it is supposed that equity can, in some unexplained manner, evolve rules as to gift or pre-emption without any example or analogy in the rules of law, I do not understand how the maxim is to be applied. No equity, for instance, could invent rules on the subject of inheritance or limitation, and apply them to the determination of rights. Further, if the view of the majority of the Court in the cases referred to were correct, the first part of s. 24 would be superfluous. It would be easy to apply their reasoning in regard to gift and pre-emption, to marriage and inheritance, and the other matters mentioned in the section, by simply following the rule of justice, equity, and good conscience provided by the latter part of the section, and by saying that the Hindu and Muhammadan Laws were therefore to govern them.

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Upon the present occasion it is unnecessary to consider whether "gift" can properly be described as a "religious usage or institution" within the meaning of s. 24. I am here concerned only with the question whether *pre-emption* can be so described. My own opinion is that it can, and although I cannot add much to the reasons given by Spankie, J., I may observe that pre-emption is closely connected with the Muhammadan Law of inheritance. That law was founded by the Prophet upon republican principles, at a time when the modern democratic conception of equality and division of property was unknown even in the most advanced countries of Europe. It provides that, upon the death of an owner, his property is to be divided into numerous fractions, according to extremely rigid rules, so rigid as to practically exclude all power of testamentary disposition, and to prevent any diversion of the property made even with the consent of the heirs, unless that consent is given after the owner's death, when the reason is, not that the testator had power to defeat the law of inheritance, but that the heirs, having become owners of the property, could deal with it as they liked, and could therefore ratify the act of their ancestor. No Muhammadan is allowed to make a will in favour of any of his heirs, and a bequest to a stranger is allowed only to the extent of one-third of the property. Under these circumstances, to allow the Muhammadan Law of inheritance, and to disallow the Muhammadan Law of pre-emption, would be to carry out the law in an imperfect manner; for the latter is in reality the proper complement of the former, and one department of the law cannot be administered without taking cognizance of the other. Among Aryan systems, which favour the notion of the inchoate rights of heirs, the rule of primogeniture, the *jus representationis*, and the exclusion of females from inheritance, except in special cases, the property is not so completely split up on the owner's death; but, under the Muhammadan system upon a man's death, not only his children are entitled to succeed to his property, but also his wife, mother, father, and other heirs, according to well-defined rules; and I myself know of a case in which, after a Muhammadan's death, his property was divided into twenty-three shares, each heir having a separate share in every parcel. If such a law of inheritance were not mitigated by the law of pre-emption, the result would be serious

inconvenience, and possibly even disturbance. It is hardly necessary to add that the *zenana* system, which the Muhammadans regard as based upon religious texts, and which emphatically prohibits invasion of the privacy of a domestic habitation, lends an importance to the pre-emptive right, even when claimed *ex jure vicinitatis*, which it would not perhaps have otherwise possessed. This would go some way to support Mr. Justice Spankie's conclusions ; but the point is perhaps not one of much practical importance, because, whatever view may be taken as to the right of pre-emption, all are agreed that it must be enforced by the Courts I need only refer to one more case on this part of the subject—*Ibrahim Saib* v. *Muni Mir Udin Saib*,[1] decided by the Madras High Court, in which Holloway, J., stated the question to be—" Whether a Muhammadan can exercise the right derived from neighbourhood (*ex jure vicinitatis*) to insist upon the sale by a Hindu being made to him instead of to another Muhammadan." I concur in the conclusion arrived at by Holloway, J., in that case, so far as that conclusion simply answered in the *negative* the specific questions enumerated by the learned Judge. But unless the Civil Courts Act in the Madras Presidency as to the administration of the Muhammadan Law is very different to that which is in force in these Provinces, I am bound to say that is much in his mode of treating the Muhammadan Law of pre-emption, in which I am unable to concur.

So far as I have been considering the question whether the Muhammadan rule of pre-emption can, at least by liberal construction, be described as a " religious usage or institution " within the meaning of the Bengal Civil Courts Act. Before leaving s. 24, I wish to refer to the word "*parties*," which occurs in it. And upon this point much of what I have already said as to the provisions of the old Regulations applies also to the interpretation of this section. I do not understand the word to mean the *parties to an action*, but it must be interpreted with reference to the *inception* of the right involved in the action. Any other interpretation would render the section impracticable, if not meaningless. Who are necessary *parties to an action* is a matter governed by the rules of procedure, and in a country like India, where personal laws prevail, it is not an uncommon occurrence that every one of the persons arrayed as parties to the suit

[1] (1870) 6 Mad. H. C. R., p. 26.

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belongs to a different race and religion. In such a case, it would be impossible to administer any particular law, if the word "parties" in the section meant "parties to the suit." This is obviously the only interpretation which can apply to the administration of Muhammadan Law of inheritance and succession by our Courts. Indeed, cases are readily conceivable in which none of the *parties to the suit* are Muhammadans, but in which their right, having been derived by transfer or otherwise from Muhammadans, the Muhammadan Law would be the sole rule of decision, because the inception of the rights to be adjudicated upon took place under that law. This can be best illustrated by supposing the case of a Muhammadan who dies leaving a widow, a son, and a daughter, each one of whom conveys his or her share, by gift or sale in the estate of the deceased, to a Hindu, a Christian, and a Parsi, respectively. It is to my mind obvious that in a suit between these various transferees, involving the ascertainment of the extent of the right of each person, the Muhammadan Law would, under the former part of s. 24 of the Bengal Civil Courts Act, be the only possible guide for decision, and that law would apply in its strictest force, notwithstanding the circumstance that none of the *parties to the suit* belonged to the Muhammadan persuasion. There is no reason for not applying the same principle to the cases to which this reference relates; and it follows that the circumstance that some of the parties to these suits are Hindus, would not, *ipso facto*, render the Muhammadan Law of pre-emption inapplicable, but that the question must be decided with reference to the rules governing the *inception* of the pre-emptive right claimed in these two cases. This leads me to another aspect of the question. To the cases out of which this reference has arisen, both Hindus and Muhammadans are parties, and the standing Full Bench rulings of this Court, already referred to, lay down the rule that the Muhammadan Law of pre-emption is to be administered, not as a *law* by which the Courts are bound, but only on the general principles of justice, equity, and good conscience. And if this is so even in cases where *all* the parties are Muhammadans, it follows *á fortiori* that in cases like the present, where some of the parties are Hindus, the same principle would apply; and thus the question whether the Hindu Law recognizes any rules of pre-emption naturally assumes sufficiently great importance to

justify my dwelling upon it at some length; for no rule of equity can either invent the law of pre-emption or administer it to people who never had such a law. And, in view of this circumstance, I will deal with the matter under three heads; *first*, the history of the law of pre-emption, and its introduction into India; *secondly*, the manner in which it has been administered by the British Court; and *thirdly*, the Muhammadan texts upon which my conclusions are founded.

Upon the first point, I desire to cite a passage from the introduction of Sir W. Macnaghten's "Principles and Precedents of Muhammadan Law," (p. 14). He says:—"Sales of land and other immovable property are clogged with an incumbrance, which is not, however, peculiar to this Code. I allude to the law of pre-emption. This confers the privilege on a partner or a neighbour to preclude any stranger from coming in as a purchaser, provided the same price be offered as that which the vendor has declared himself willing to receive for the property to be disposed of." Then, after discussing the question whether pre-emption prevailed originally among the Hindus, he goes on to say:—"I have found in the Maha Nirvana Tantra, a work which chiefly treats of mythology, a passage which would seem to imply that pre-emption is recognized as a legal provision according to the notions of the Hindus. But it remains yet to be decided whether this shall be held to be practical law or not."

I hope, before ending this judgment, to contribute something to a settlement of the question which Sir W. Macnaghten regarded as undecided, having long taken an interest in the subject of pre-emption, and having considered it my duty to investigate the much-vexed question whether the right existed under the old Hindu Law, and whether the Muhammadans found it existing when they came into India. I may here quote from a very distinguished Sanskrit scholar, Dr. Rajendralal Mitra. After stating the Smritis, from which the Hindu Law is derived, contain no reference to the right of pre-emption, the learned scholar goes on to say:—"The word *samanta* is everywhere defined to mean owner of an adjoining property, and not the right which such an owner has to claim precedence in purchasing his neighbour's property. The word occurs first in Manu (VIII, 258), and there it means 'neighbour,' and most of the other text-writers have since used it invariably in the same

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sense. The verse of Kátyáyana might, at first sight, suggest a different meaning, but the commentators leave us no opinion in the matter. The verse, literally translated, would mean 'a village is the *samanta* of a village, a field is said to be so of a field, a house is defined to be that of a house, from their being near to each other.' And this suggests the idea that each of the classes of land being reckoned *samanta* to a similar class, there would be no *samanta* in a dissimilar case; that is, the owner of a field or hut could not claim pre-emption for a village, and unless this be admitted, the classification becomes unmeaning. But Vijnanesvara, the author of the Mitákshará, commenting on the text of Yajnavalkya, does not accept this obvious and direct meaning. He says, by the words *grama*, etc., men residing thereon are indicated. And all the leading writers of Digests accept this meaning. Under these circumstances, it would be hazardous in a question of positive law to accept any other meaning. The practice of resorting to figures of metonymy is very common among Sanskrit writers, and we cannot urge that the interpretation of Vijnanesvara is a forced one. In so far, therefore, the argument as founded on the word *samanta* may be rejected as untenable. Dr. Monier Williams, in his English-Sanskrit Dictionary, has given *prakhyata* as the equivalent of *pre-emption*, but this meaning has not been given in any original Sanskrit work on law. I must therefore reject it, too, as of no value in the decision of the question at issue. The absence, however, of a concrete term to imply pre-emption does not necessarily imply the absence of such a right, and there are indications to the contrary in our law books. Pre-emption pre-supposes living in joint families, and desire to exclude strangers from intruding into a family-house or the privacy of a *zenana*. The Hindus felt this desire at an early period, and tried to restrain co-sharers from selling their shares to outsiders; but this device never developed itself into positive law, and the latest Digest-writer, the author of the Dáyabhága, in a manner sets it aside by saying that sales of undivided shares are immoral, but valid in law. In so far, the claim to pre-emption in cases where it is most urgently demanded is entirely abandoned.... Had there been any authentic law in existence, it would have for certain been cited in some case or other, but there is no record of any such citation. These remarks are certainly not in keeping with the positive rules

laid down in the Maha Nirvana Tantra, and quoted in the preface to Macnaghten's 'Muhammadan Law;' but those rules, not having been recognized by any of our current law-books, cannot be held binding or authentic. It has been nowhere recognized as an authority on law. Nor has it been anywhere quoted in a law-digest. Moreover, the Tantra is not by any means an ancient work. The belief is, that the most authentic Tantras number sixty-four, but the name of the Maha Nirvana does not occur among them, and it must therefore be accepted to be of secondary importance, even as a Tantra. My idea is, that the administration of law by *Kazis* during the Muhammadan period gave wide currency to *haq-i-shufa*, and its advantage became so apparent to the Hindus that they attempted to naturalize it by working on its principles in the Tantra in question, where an interpolation could easily be effected without any fear of detection. This must have happened three or more centuries ago."

I now quote from another eminent authority, Dr. Jolly of the University of Würzburg, in Germany, who recently acted as the Tagore Professor of Hindu Law at the University of Calcutta. He says:—"The only trace of pre-emption in the Hindu Law which I am aware of occurs in a text quoted in the Mitákshará and other standard law-books. It is as follows:—'Transfers of landed property are effected by six acts; by consent of fellow-villagers, kinsmen, neighbours, and co-parceners and by gift of gold and water.' This text indicates clearly the existence in the early period of the Hindu Law of a feeling that a transfer of landed property is not valid unless the neighbours, fellow-villagers, and those, who are but remotely concerned with it, should have given their consent to its being effected. These persons might therefore be supposed perhaps to have been invested with a right of pre-emption. Whatever notions may have been prevalent on this subject in the early period of Hindu Law, this much is clear, that the compilers of those Commentaries and Digests of law on which the modern law is based did not approve of any sort of pre-emption. Thus the Mitákshará, in dealing with the above text, deprives it entirely of such legal significance as may have once belonged to it. The consent of fellow-villagers, according to the Mitákshará, is required for the publicity of the transaction merely; but the contract is not invalid without their consent. The consent of neighbours tends to obviate future disputes

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concerning boundaries. The consent of kinsmen and co-parceners (*dáyáda*) is indispensable when they are united in interest with the vendor. If they are separate from him, their consent is useful, because it may obviate any future doubt as to whether they are separated or united, but the want of their consent does not invalidate the transaction. The gift of gold and water serves to ratify the transfer of property—(see Colebrooke's Mitákshará, I, 230—232). This interpretation of the Mitákshará may be viewed as an instance of the way in which the Indian Commentators used to dispose of obsolete laws. At the same time, it shows clearly that anything approaching to pre-emption was entirely foreign to the ideas of such an eminent authority as Vijnanesvara, the author of the Mitákshará. Nor is there any other trace of pre-emption in the Hindu law-books. The Tantras, generally speaking, have never been recognized as authoritative law-books in any sense of the word."

Adopting the authority of the eminent Sanskritists, there is no doubt in my mind that the question which Sir William Macnaghten regarded as open to doubt is in reality not so, and that there has never been such a right as that of pre-emption recognized by the Hindu Law, though I cannot forget that the rule of that law which prohibits any member of a joint undivided family from selling his share in the joint property without the consent of his co-parceners, aims at a result not dissimilar to that which the Muhammadan Law of pre-emption is intended to achieve. The fact, that some of the parties concerned in the present cases are Hindus, need not therefore in itself complicate the question as to the applicability of the Muhammadan Law, nor create any such difficulty as would otherwise have arisen with regard to the question how the rule of pre-emption is to be administered according to justice, equity, and good conscience, in a case where, some parties being Hindus and the other Muhammadans, the law of each provided different rules for the enforcement of the pre-emptive right.

I now turn to the case-law upon the subject. In *Ramrutun Singh* v. *Chander Naraen Rai*,[1] which is the earliest reported case, having been decided in 1792, it was held by the Bengal Sudar Dewani Adawlat, that among the holders of separate shares of an hereditary *zemindari*, each, according to the Hindu

[1] 1 S. D. A. R., 1.

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Law, may sell his share to whom he pleases, and the other sharers have no necessary right of pre-emption. And in *Ram Kanhaee Rai* v. *Bung Chand Bunhoojea*,[1] decided in 1820, it was held that vicinage and partnership did not confer any right of pre-emption according to the Hindu Law as current in Bengal. A similar view of pre-emption was taken by the Madras Dewani Adawlat in *Kristnien* v. *Sendalangara*,[2] decided in 1849. In that case, before judgment was delivered, the *Pandits* who were at that time consulted as assessors upon points of Hindu Law, gave it as their opinion that no general right of pre-emption existed under that law, and could not be enforced except in cases "where there exists a resolution in a village to the effect that a share-holder in such village should sell his land only to another share-holder of the same village, and if an inhabitant sell his estate to a stranger or to the inhabitant of another village, the other inhabitants of the village where the estate in question is situated, are competent to claim the right of pre-emption of such estate." This, however, only shows that special local custom, when duly adopted, would over-ride the General Hindu Law. These cases leave no doubt in my mind that the Courts have never recognised the rule of pre-emption as a part of the Hindu Law.

The law of pre-emption is essentially a part of Muhammadan jurisprudence. It was introduced into India by Muhammadan Judges who were bound to administer the Muhammadan Law. Under their administration it became, and remained for centuries, the common law of the country, and was applied universally both to Muhammadans and Hindus, because in this respect the Muhammadan Law makes no distinction between persons of different races or creeds. "A Musalman and a *Zimmee* being equally affected by principles on which *shafa* or right of pre-emption is established, and equally concerned in its operation, are therefore on an equal footing in all cases regarding the privilege of *shafa*." (Hamilton's "Hedaya," Vol. III, p. 592). What was the effect of this? In course of time, pre-emption became adopted by the Hindus as a custom. I may here refer to an official paper printed in the Revenue Reporter, Vol. V, at p. 150, in which it is said that

[1] 3 S. D. A. R., 17.

[2] 3 Morley's Digest, p. 344.

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the rule of pre-emption has been adopted as a custom almost universally throughout these Provinces, even by villages which are purely Hindu. I have already in *Zamir Husain* v. *Daulat Ram*,[1] and in the recent case of *Sheoratan Kuar* v. *Mahipal Kuar*,[2] explained my views as to the manner in which this custom has been adopted by the Hindu community.

Now, there can be no question that the Muhammadan Law of pre-emption must be administered in cases in which *all* the parties concerned are Muhammadans. The question is, whether it should be administered in cases in which only the vendee is a Hindu. Before expressing my own view of the matter, I think it will be useful to review the case-law on the subject, and to ascertain how it stands at present. The most important of the cases is that of *Sheikh Kudratulla* v. *Mohini Mohan Shaha*.[3] It was there ruled by a majority of the Judges of the Calcutta High Court (Peacock, C. J., and Kemp and Mitter, JJ.), that a Hindu purchaser is not bound by the Muhammadan Law of pre-emption in favour of a Muhammadan co-parcener, nor is he bound by the Muhammadan Law of pre-emption on the ground of vicinage, because the right of pre-emption in a Muhammadan does not depend on any defect of title on the part of his Muhammadan co-parcener to sell except subject to his right of pre-emption, but upon a rule of Muhammadan Law which is not binding on the Court, nor on any purchaser other than a Muhammadan. The minority (Norman, and Macpherson, JJ.), on the other hand, held that whenever a Muhammadan co-sharer or neighbour has a right of pre-emption, when property is sold by his neighbour or co-sharer, also a Musalman, his right is not defeated by the mere fact that the purchaser is a Hindu. The ruling of the majority of the Court was adopted by a Division Bench of this Court in *Moti Chand* v. *Mahomed Hossein Khan*.[4] These two cases are clear authorities against the opinion which I hold. Upon the converse of the proposition which they laid down, I may refer to a case in which the pre-emptor was a Muhammadan, the vendor a Hindu, and the vendee a Muhammadan. This was the Full Bench case of *Chundo* v. *Hukeem Alim-ood-deen*,[5]

[1] I. L. R. 5 All., 110.
[2] I. L. R., 7 All., 258.
[3] 4 B. L. R., 134.
[4] N.-W. P. H. C. R., 1875, p. 147.
[5] N.-W. P. H. C. R., 1874, p. 28.

in which it was ruled (Spankie, J., dissenting), that the application of Muhammadan Law in a suit for pre-emption between a Muhammadan claimant of pre-emption and a Muhammadan vendee on the basis of that law, is *not* precluded by the fact of the *vendor* not being a Muhammadan. The rule so laid down was the only one which could be adopted consistently with the principle on which the two last mentioned cases were decided. But it was subsequently and formally over-ruled in the Full Bench case of *Dwarka Das* v. *Husain Bukhsh*,[1] in which it was held (Stuart, C. J , and Pearson, J., dissenting) that where the vendor is a Hindu, a suit to enforce a right of pre-emption founded upon Muhammadan Law is not maintainable. In this case, the majority of the Court followed in principle the judgment of Couch, C. J., in *Poorna Singh* v. *Harrychurn Surwah*,[2] where it was held that the right of pre-emption arises from a rule of law by which the owner of the land is bound, and that it is essential that the *vendor* should be subject to that rule of law.

I have read these cases carefully, and it appears to me impossible to reconcile them. The most important of them are *Sheikh Kudratulla* v. *Mohini Mohan Shaha*,[3] and *Dwarka Das* v. *Husain Bukhsh*,[1] in which a full Bench of the Calcutta High Court and a Full Bench of this Court respectively laid down two propositions, one being, so to say, the converse of the other. Bearing in mind the rules of the Muhammadan Law of pre-emption, it seems to me impossible to hold that both of these decisions can be right. I know that, as a matter of pure logic, it does not follow because a proposition is true, that its converse must be true also; and it is obvious that, as a matter of pure reasoning, if a Muhammadan pre-emptor cannot enforce pre-emption against a Hindu purchaser, the vendor being a Muhammadan, it does not necessarily follow that a Muhammadan *can* enforce pre-emption where the vendor is a Hindu and the purchaser a Muhammadan. But the exigencies of the definite rules of the Muhammadan Law of pre-emption happen to be such as to render it essential that the various propositions relating to the subject should be governed by a common

[1] I. L. R., 1 All., 564.
[2] 10 B. L. R., 117.
[3] 4 B L. R., 134.

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principle, and therefore consistent with each other. I may illustrate my meaning by supposing concrete cases.

In all cases of pre-emption there are three parties to be considered,—the pre-emptor, the vendor, and the purchaser. And so far as the question now under consideration is concerned, different cases may be imagined by supposing all, or one, or two of these three parties to be Hindus or Muhammadans. The simplest and ordinary cases where *all* the three parties concerned are Muhammadans, and in such circumstances it is obvious, as was, indeed, admitted by Mitter, J., and the learned Judges who agreed with him in the case of *Sheikh Kudratulla* v. *Mohini Mohan Shaha*,[1] that the Muhammadan Law would apply,—a proposition which, as a matter of law, though not of logic, necessarily implies a negative answer where *all* the parties to a pre-emptive suit are Hindus. Nor can there be any difficulty in holding that, for similar reasons, the same negative answer must be given in a case in which the pre-emptor being a Muhammadan, both the vendor and the vendee are Hindus; or conversely, where the pre-emptor being a Hindu, both the vendor and vendee are Muhammadans. And to carry the reasoning further, the same negative answer must be given where, both the pre-emptor and the vendor being Hindus, the only party who is Muhammadan is the vendee. Nor would any one maintain that the Muhammadan Law would govern a pre-emptive suit in which the pre-emptor and the vendee are both Hindus and only the *vendor* is a Muhammadan. Indeed, I am not aware of a single case in which the Muhammadan Law *as such* has been held applicable in any of such circumstances. The reason of the negative answer is that, although the Muhammadan Law of pre-emption makes no distinction of race or creed, that law, from being the common law of the land, applicable alike to Hindus and Muhammadans, has been reduced to the status of being a personal law of the latter, who alone can enforce the rights or incur the obligations created by that personal law. Rights derived from members of that community, whether by Hindus or by other non-Muhammadans would of course, be governed by the Muhammadan Law, because, as I have already explained the *inception* of the right and not the array of the parties *to the*

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suit must be the turning point of the decision within the meaning of s. 24 of the Civil Courts Act. But because a Hindu is not under that section subject to the Muhammadan Law of pre-emption, he cannot avail himself of any pre-emptive right which that law creates only in favour of those who are subject to its behests. And the reason is simple. The rights and obligations created by that law, as indeed by every other system with which I am acquainted, must necessarily be reciprocal. Then, if a Hindu cannot as a pre-emptor avail himself of the Muhammadan Law of pre-emption in a case where the *vendor* is a Muhammadan and the *purchaser* is a Hindu, what reason is there for holding that a Muhammadan pre-emptor *can* enforce the pre-emptive right when the *vendor* is a Hindu and the purchaser a Muhammadan? The question was discussed by this Court in the Full Bench case of *Chundo* v. *Hakeem Alim-ood-deen*,[1] and the majority of the Court gave an *affirmative* answer upon a reasoning which must necessarily lead to the conclusion that an *affirmative* answer should also be given to the proposition which, as I have just stated, can only be answered in the *negative*. Indeed, the untenability of the proposition, as already pointed out, was not long afterwards enunciated by the majority of the Full Bench of this Court in *Dwarka Das* v. *Husain Buksh*,[2] which furnishes an answer in the *negative*, perfectly consistent with my own view,—an answer which gives full effect to an important portion of the reasoning adopted by Mitter, J., in *Sheikh Kudratulla* v. *Mohini Mohan Shaha*,[3] though it controverts the conclusion at which the learned Judge arrived. He says (p. 147) :—"If we decide this case against the Hindu purchaser, and thereby deprive him of a property which has already become his by the law of his country, we must bear in mind that we have already decided that, so far as he is concerned, he will never be able to enforce any right of pre-emption even though a Muhammadan should choose to purchase a part of his family-house from one of his co-parceners. So long as this country was under the Muhammadan Government, the right of pre-emption was extended to all classes of persons without any distinction of creed, color or birth, inasmuch as no such

[1] N. W. P. H. C. R., 1874, p. 28.
[2] I. L. R. 1 All., 564.
[3] 4 B. L. R., 134.

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distinction was recognized in that respect by the Muhammadan Law, which was in fact the law of the land. Now that the Muhammadan Law has ceased to be the law of the country, it seems to me to be manifestly unjust and inequitable that we should enforce the Muhammadan Law of pre-emption against a Hindu, without giving him the benefit of that law in other cases in which he would like to stand in the position of a pre-emptor."

I have said enough to show that with a great deal of the reasoning upon which this passage proceeds I entirely concur. But I reject the conclusion, because the necessary steps leading to it are based upon what I may respectfully call fallacies as to the rules of the Muhammadan Law of pre-emption. These I shall presently discuss at some length; but I may here make some observations with reference to the illustration given in the passage, namely, the case of a Hindu co-parcener selling his share in his family-house to a Muhammadan. I should unhesitatingly say in such a case that the sale was subject to the incidents of the Hindu Law which governed the rights of the *vendor*, that if that law provided a rule of pre-emption, the rule should be enforced against the Muhammadan purchaser, whether his law recognized it or not. In such a case there can be no question of the Muhammadan being deprived of a "property which has already become his by the laws of his country." He bought it subject to the rules which governed it in the hands of his vendor, from whom he has derived his title, and the circumstance that he is not a Hindu will not save him from the incidents of the Hindu Law. Indeed, in the case supposed, as the law stands, the Muhammadan purchaser would no doubt be free from a pre-emptive claim at the instance of his Hindu vendor's co-parceners. But he would be free only because the Hindu Law provides no pre-emptive right. He would, however, be liable to something "worse," by reason of that law which governed the property in the hands of his vendor. The sale might be avoided at the instance of the Hindu co-parcener, if the subject of the sale was a share in joint property. And if it can be shown that property in the hands of a Muhammadan is *in principle* as much subject to the pre-emptive claim of his Muhammadan co-parcener or neighbour as the marital estate in the hands of a Hindu widow, or the share of a member of a Hindu joint family, is subject to its own restrictions or qualifications as to sale,

it seems to me that the enforcement of the Muhammadan rule of pre-emption against the Hindu purchaser from a Muhammadan would be anything but "manifestly unjust and inequitable." And once this proposition is established, it will be obvious that all the exigencies of Mr Justice Mitter's reasoning, contained in the passage cited, are satisfied by the *ratio decidendi* in *Dwarka Das* v. *Husain Buksh*,[1] wherein the majority of the Full Bench of this Court *declined* to enforce the Muhammadan rule of pre-emption in a case in which the vendor was a Hindu, although the pre-emptor and the purchaser were both Muhammadans. For if the *ratio decidendi* of that ruling is correct, the matter stands thus :—Property in the hands of a Muhammadan *is* subject to the pre-emptive claim of his Muhammadan co-parcener or neighbour ; property in the hands of a Hindu *is not* subject to the Muhammadan rule of pre-emption. The Muhammadan *can* claim the benefit of the law of pre-emption. The Hindu *cannot* claim the benefit of that law. These propositions, which seem to me to be intelligible, consistent, and equitable, would meet all the objections which Mitter, J., contemplated ; and, if they are correct, there can be no question of either the Hindu or the Muhammadan being "deprived" of his right by reason of the law of the other. The pre-emptive rights and obligations between Muhammadan co-parceners and neighbours being mutual, the principle of the maxim *qui sentit commodum sentire debet et onus* applies, but it would not apply in the case of a Hindu where no such reciprocity exists. And if the Hindu purchaser is to be affected by the Muhammadan pre-emptive claim, it would be on the principle of a cognate maxim that land passes with its burdens, *terra transit cum onere*, and there would be no violation of the notions of justice, equity, and good conscience.

This, however, begs the whole question, and having already supposed the various cases in which it would arise on account of the difference in religion of the partners in a pre-emptive case, the only case which remains to be conceived is one in which the pre-emptor and the vendor are both Muhammadans, and the only non-Muhammadan among the parties is the vendee. This is the case now before us, and to the question whether the Muhammadan Law of pre-emption is applicable to such a case,

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my answer is in the affirmative. But because the authority of Sir Barnes Peacock and Mr. Justice Dwarka Nath Mitter demands the highest respect from me, as from every one else connected with the administration of justice in British India, I feel myself bound, in differing with them, to explain my reasons fully by reference to original texts of the Muhammadan Law of pre-emption, which I cannot help feeling would have led those eminent Judges to a different conclusion had the texts been accessible in the English language. I make this observation because Sir Barnes Peacock at the beginning of his judgment in the celebrated case of *Sheikh Kudratulla* v. *Mohini Mohan Shaha*,[1] used expressions which leave no doubt that, even after the case had been argued before him in the Full Bench, his Lordship was inclined to form an opinion similar to that which I have formed in this case, and that he adopted the opposite view in consequence of the opinion which had been "so forcibly and clearly expressed by Mr. Justice Mitter." And because the judgment of that learned Judge in the most exhaustive and powerful manner presents the opposite view to that which I hold in this case, the best way in which I can justify my own opinion is to examine the reasoning leading to the conclusions which he and the majority of the Court adopted in that case.

Dealing thus with the question now before us, I may remark, in the first place, that I entirely agree with Mr. Justice Dwarka Nath Mitter, in holding that the answer to the question depends upon the *nature* of the right of pre-emption under the Muhammadan Law. I also concur generally in the following remarks (p. 140):—"If that right is founded on an antecedent defect in the title of the vendor, that is to say, on a legal disability on his part to sell his property to a stranger, without giving an opportunity to his co-parceners and neighbours to purchase in the first instance, those co-parceners and neighbours are fully entitled to ask the Hindu purchaser to surrender the property, for although as a Hindu he is not necessarily bound by the Muhammadan Law, he was at any rate bound by the rule of justice, equity, and good conscience, to inquire into the title of his vendor; and that very rule requires that we should not permit him to retain a property, which his vendor had no power to sell. If, on the contrary, it can be shown that there was no such defect in the title of

[1] 4 B. L. R., 134.

the vendor, or in other words, that he was under no such disability even under the Muhammadan Law itself, it would follow, as a matter of course, that there was no defect in the title of the purchaser at the time of its creation." Further on he says: "Now, so far as I can judge of the Muhammadan Law of pre-emption from the materials within my reach, it appears to me perfectly clear that *a right of pre-emption is nothing more than a mere right of repurchase, not from the vendor, but from the vendee*, who is treated for all interests and purposes as the full legal owner of the property which is the subject-matter of that right." In this passage, Mitter, J., referred to the materials upon which he based his conclusion, and he proceeds to quote passages from those materials. On this point I have to say that those materials appear to me to be in several respects inadequate. They are to be found in the *Hedaya*, or rather in the translation of the *Hedaya* made by Mr. Hamilton about a century ago, under the orders of the Governor-General, Warren Hastings. It was not, however, a translation of the original Arabic text, but of a Persian translation. For that work gratitude is due to Mr. Hamilton, but at the same time I am afraid it has been sometimes the source of mistakes by our Courts in the administration of the Muhammadan Law. Mitter, J., says that he is satisfied by certain passages in this work, that the conclusions at which he arrived were consistent with the Muhammadan Law of Pre-emption. I need not quote any more passages from the learned judgment, as I purpose to analyse all the main arguments adopted by the majority—Peacock, C. J., Kemp and Mitter, JJ. The first proposition which those learned Judges laid down was, that *the right of pre-emption under the Muhammadan Law does not exist before actual sale*, because, on the one hand, the pre-emptor has no right of prohibiting the sale, and, on the other hand, the vendor is not bound to offer the property for purchase to the pre-emptor before selling it to the stranger; and they held their view to be supported by the circumstance that the pre-emptor cannot *before* such sale relinquish his pre-emptive right, nor could the absence of his consent vitiate the sale. Upon this reasoning they held that a Muhammadan owner of property was subject to the *legal disability* arising out of pre-emption, but was free to sell it regardless of that right. They, then, proceeded to lay down the *second* main

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proposition that a sale, in respect of which pre-emption might be claimed, passed full ownership to the vendee, and did not involve "any defect of title," because it could not be regarded as an infringement of a pre-existing pre-emptive right. From this the learned Judges concluded that the right of pre-emption under the Muhammadan Law was "a mere *right of repurchase*, not from the *vendor*, but from the *vendee*," which right could not be enforced by a Muhammadan pre-emptor against a Hindu *vendee*, because the property, even in the hands of the Muhammadan *vendor*, not being subject to the pre-emptive right at the time when the title of the Hindu *vendee* was created by the sale, the right could not run with the land, nor follow it in the hands of a stranger not subject to the Muhammadan Law. These are the main conclusions at which the learned Judges arrived, and the rest of their reasoning seeks to support those conclusions by the argument that, under the Muhammadan Law, the right of pre-emption is a right "feeble" and "*defective*," because, according to the rules of that law it can be easily defeated by devices which Mitter, J., designated as, "*tricks and artifices*."

I believe in giving this analysis I have exhausted all the arguments which the learned Judges employed in arriving at the view to which I am opposed. But if it can be shown from the original texts of the Muhammadan Law itself that the main propositions upon which the whole argument proceeds are in themselves erroneous, I think I shall have justified my view. *First*, then, as to the *nature* of the right. I remember the salutary warning of the Roman Jurist Javolenus (whom Creasy, C. J., has quoted in his work on "International Law"), that the task of laying down definitions is not only "the most laborious, but also the most perilous." The exigencies of this case, however, require that I should endeavour to define the right of pre-emption as prescribed by the Muhammadan Law; and I think I am strictly within the authorities of that law when I say that pre-emption is a right which the owner of certain immovable property possesses, as such, for the quiet enjoyment of that immovable property, to obtain, in substitution for the buyer, proprietary possession of certain other immovable property, not his own, on such terms as those on which such latter immovable property is sold to another person. I could

easily support every word of this definition by original Arabic texts of the Muhammadan Law itself, but I will confine myself only to such texts as bear immediately upon the main propositions involved in this case. I may, however, observe that the *nature* of the right, as appears from the definition which I have given, partakes strongly of the nature of an easement,—the "*dominant* tenement" and the "*servient* tenement" of the law of easement being terms extremely analogous to what I may respectively call the "*pre-emptive* tenement" and "*pre-emptional* tenement" of the Muhammadan Law of pre-emption. Indeed, the analogy goes further, for I shall presently show that the right of pre-emption, like an easement, exists before the injury to that right can give birth to a cause of action for a suit,—sale in the one case corresponding to the invasion of the easement in the other. In short, I maintain that, under the Muhammadan Law, the rule of pre-emption, proceeding upon a principle analogous to the maxim *sic utere tuo ut alienum non lædas*, creates what I may call a legal servitude running with the land; and the fact that that law has ceased to become the general law of the land cannot alter the *nature* of the servitude, but only render its enforcement dependent upon the religion of the party who claims the servitude and of the party who owns the property subject to that servitude.

Now, the main authority upon which the learned Judges relied for the view that the right of pre-emption does not exist before sale, is a passage in Mr. Hamilton's *Hedaya* to be found at page 568, Vol. III, of his translation. The translation is at its best a very loose one when compared with the original Arabic text, which I shall literally translate here:—"Pre-emption becomes obligatory (*i.e.*, enforceable) by a contract of sale, which means after the sale. Not that sale is the cause (of pre-emption), for the cause is conjunction (of the properties) as we have already mentioned. And the reason in the matter is, that pre-emption becomes obligatory when the seller has turned away from (*i.e.*, wishes to get rid of) the ownership of his house, and the sale makes this apparent. Hence, proof of sale is sufficient as against him even to the extent of the pre-emptor taking it (the house), when the seller acknowledges the sale, although the buyer contradicts him." The meaning to be evolved from the passage is obviously different from

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the interpretation which can be placed upon Mr. Hamilton's translation, which indeed seems to me to have misled Mitter, J., and the other learned Judges, who agreed with him. The Arabic word *tajibo*, which occurs in this and other passages, and which Mr. Hamilton translated as "*established*," really means "becomes *obligatory*, *necessary* or *enforceable*" as a term of law, and I cannot help feeling that if the passage had been accurately translated by Mr. Hamilton, the majority of the Full Bench, in *Sheikh Kudratulla's* case,[1] might possibly have arrived at a very different conclusion. It is unnecessary to quote any more passages from the original Arabic text of the *Hedaya*, which distinctly go to show that the cause or foundation of the right of pre-emption is the conjunction of the pre-emptive tenement with the pre-emptional tenement, that its object is to obviate the inconvenience or disturbance which would arise by the introduction of strangers, that the right exists antecedently to sale, and that sale is a condition precedent, not to the *existence* of the right, but only to its *enforceability*. Mr. Hamilton's translation is sufficiently accurate to indicate these conclusions, and I shall therefore pass on to other books as high in authority as the *Hedaya* itself. Here is a short text from the Durrawl-Mukhtar:—"The cause of pre-emption is the contiguousness of the pre-emptor's property with the purchased property, whether by co-parcenership or vicinage." Again, a more explicit passage is to be found in Aini, a Commentary from the Kanz:—"The author (of the Kanz) says '*by sale*,' which must be referred to his expression, '*pre-emption becomes obligatory*.' This would indicate that the cause of the obligatoriness of pre-emption is sale, that is the sale of the pre-emptional house, and some have held this very opinion. The correct opinion, however, is that the cause of pre-emption is the conjunction of the properties in a necessary manner, and sale is a condition (of pre-emption). From this it follows that pre-emption becomes enforceable by sale, that is, after its coming into existence." All the different views on the subject entertained by Muhammadan jurists, who were only too fond of the mediæval schoolmen's method of arguing such questions, are to be found in Birjandi, a well-known Commentary on the Muhammadan Law:—"Be it known

[1] 4 B. L. R., 134.

that the language of the author implies that the cause of the obligatoriness of pre-emption is the conjunction of the pre-emptor's property with the subject of the sale in some way or other, and this is the opinion adopted by the *Mashaikhs* (elders) in general. Khassaf says that pre-emption becomes enforceable by sale, then by demand, and therefore both become the cause; but as to this it may be said that, when pre-emption is established by sale, there is no meaning in establishing it a second time by demand. Sheikh Abubakr Razi used to maintain that pre-emption becomes enforceable by sale, the right of taking possession is established by demand, and ownership (of the pre-emptor) is established either by decree or by mutual consent. Sheikh-ul-Islam held that co-parcenership, together with sale, constitutes the reason of the enforceability of pre-emption, and it is emphasized by demand, and ownership is established either by decree or by mutual consent, and so it is laid down in the *Zakhira*." These texts leave no doubt in my mind that the "cause" or foundation of pre-emption is "*conjunction*" of the pre-emptor's property with that of the vendor, and, inasmuch as such conjunction existed before the sale, it follows that the pre-emptive right originates antecedently to the sale in respect of which it may be exercised. For example, when two Muhammadans own shares in a house, the share of each may in turn be regarded as dominant or servient to the other for purposes of pre-emption, because the conjunction of the properties of the two owners being a circumstance common to both, alternately entitles the other to claim pre-emption when the proper occasion arises, that is, when either transfers his share by sale. The analogy of a non-apparent easement again suggests itself. It is true, as Mitter, J., says that neither can prevent the other from selling his share to whomsoever he pleases, because the Muhammadan Law "nowhere recognizes any right of *veto* in the pre-emptor," nor does it impose any "positive legal disability" on the vendor in this respect. This, no doubt, at first sight suggests a distinction in principle between pre-emption and non-apparent easement such as a right annexed to A's house to prevent B from building on his own land. But the distinction, so far as the question of the origin of right is concerned, is in reality not one of principle, but of detail, arising from the difference

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in the nature of the occasion demanding the exercise of the right. In the one case, that occasion is sale; in the other, it is building. Now, it is true that in the one case the pre-emptor cannot prevent his co-parcener from selling his property to a stranger, whilst in the case supposed, A could prevent B from building on his land. But the reason of the distinction is not that the right of the one did not exist before the sale, and the right of the other did exist before the building. The reason is this. The object of the non-apparent easement possessed by A is the beneficial enjoyment of his own property, and *definite* infringement of that right is ascertained when B takes any definite action to build upon his land,—a state of things which would be sufficient to afford a cause of action in favour of A, seeking preventive relief or other assertion of his right of easement. But in the case of pre-emption, the *object* of the right is to prevent the intrusion, *not* of *all* purchasers in general, but only of such as are objectionable from the pre-emptor's point of view. Again, the right (unlike the right of *re*l possessed by members of a joint Hindu family with respect to the sale of his share by any one of them) is not true from definite qualifications, among which the most important is that the pre-emptor, complaining of the intrusion of the purchaser, should place himself absolutely in the position of the purchaser with reference to the terms of the contract of sale, such as the amount and payment of the price, etc. It is obvious, then, that before a pre-emptor can make up his mind to assert his pre-emptive right, he must, *ex necessitate rei*, know definitely who the purchaser is, and under what terms he has purchased the property, because it may well be that, on the one hand, he may have no objection to such purchaser; and on the other hand, even if he does object, he may not be in a position to pay the price which the purchaser has paid. No such considerations exist in the case of the right of *easement* which I have supposed by way of illustration. And it follows that before a sale is actually completed, the pre-emptor is not, *ex necessitate rei*, in a position to have definite information as to whether the proper occasion has arisen for the exercise of his already existing pre-emptive right. This is the reason why the law gives him no right of vetoing the sale. But the reason falls far short of showing that his right of pre-emption was

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wholly non-existent at the time of the sale, when the title of the purchaser was created. From what I have already said, it is perfectly clear to me that any action on the part of the pre-emptor before the sale would be premature, whether such action consisted of vetoing or consenting to a sale which has not yet been effected, and of which the terms and the purchaser have not yet been ascertained, in the sense of creating the legal rights and obligations which render a sale an accomplished fact in law. I have already said that, unlike the *veto* possessed by a member of a joint Hindu family, the right of pre-emption does not prohibit sale *in general* regardless of the purchaser, of the amount of the price, and other terms of the contract of sale; and because the right is in its very nature incapable of being asserted or exercised till these matters are definitely ascertained, it follows that a sale, irrespective of the pre-emptor's consent, is not void in law. The pre-emptive right may or may not be asserted or enforced; and it would be absurd to say that that which is only possible should, by a retrospective effect, vitiate that which is certain, namely the sale. This is the manner in which the jurists of the Muhammadan Law have dealt with this point of the rule of pre-emption, and it is upon very similar grounds that they hold the pre-emptor incapable of relinquishing his pre-emptive right in respect of a sale which has not yet taken place. They would say (and there is ample authority for this statement) that the identity of the purchaser, the amount of the price, and other terms of the sale, the certainty of which is essential, not to the *existence*, but to the *exercise* of the pre-emptive right, being still undefined by a legal relation between the vendor and the vendee, the pre-emptor had no means of knowing for certain whether he should or should not give up an ascertained legal right, and therefore the relinquishment of pre-emption before sale is void. Whatever the merits of this reasoning from a jurisprudential point of view may be, I confess I fail to see how it supports the view that the right of pre-emption does not exist as a restriction or qualification of the right of sale possessed by the owner of property subject to pre-emption. It is indeed not an absolutely unqualified disability, for it does not absolutely prohibit sale without the consent of the pre-emptor. But that it amounts to a qualified disability, distinctly operating in derogation of the vendor's absolute right to sell the property, and

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thus affects his title, which would otherwise amount to absolute dominion, cannot, in my opinion, be doubted. That the result of such restrictions or qualifications are dependent for their enforcement upon the occurrence of the actual sale, is a circumstance which, in my opinion, does not affect the question relating to the inception of the right of pre-emption.

But, in opposition to this view, Mitter, J., and the learned Judges, who concurred with him, relied upon the argument—that "there is nothing whatever in the Muhammadan Law which imposes upon any one the obligation of making the first offer to his neighbour, nor is there anything to show that the right of pre-emption is based upon any such obligation, the non-fulfilment of which would prevent the stranger from acquiring a complete and valid title to the property by virtue of his purchase." In dealing with this argument, I must, in the first place, observe that one of the greatest difficulties in the administration of the Muhammadan Law, as indeed of all ancient systems, lies in distinguishing *moral* from *legal* obligations. The Muhammadan Law having been evolved from the Koran and the sayings of the Prophet, naturally presents such difficulties, and the question whether the vendor is bound to offer the property to his co-parcener before selling it to a stranger, is an illustration of what I mean,—a difficulty which was felt at an early stage by the Muhammadan jurists themselves. The following is a text from Aini, a Commentary upon the Kanz, a well-known book on Muhammadan jurisprudence:—"A co-parcener is one whose share has not been divided in the property sold. This is universally agreed upon, because it has been related by Jahir that the Prophet decreed pre-emption in respect of every joint undivided property, whether a grove or a house, saying:—'It is *not lawful* for any one to sell till he has informed his co-parcener who may take or leave it as he wishes; and if he has sold without such information, the co-parcener has a preferential right to the share.' This tradition has been related by Mushini, Abu David, and Aukissai." Two other traditions to the same effect are also to be found in Muslim, which is one of the books of acknowledged authority on *Hadis* or traditions, I will, however, quote only one of them, as it brings into prominence the difficulty with which I am now dealing:—"It is related by Jahir that the Prophet said:—Pre-emption exists in all joint properties, whether land, or house,

or grove. It is *not proper* for him (the owner) to sell till he has offered it to his co-parcener, who may take it or reject it; and if the vendor fails to do this, his co-parcener has the preferential right to it until he is informed." Both these traditions have much the same effect, but in the first of them the Arabic word *la yahillo* occurs, which I have rendered by "*not lawful*"; whilst in the second the phrase employed is *la yasliho*, which I have translated as meaning "*not proper*." The importance which the Muhammadan jurists, in laying down legal principles, attached to the exact words in the sayings of the Prophet, at once gave rise to the question whether the injunction as to the vendor's giving notice to the pre-emptor and offering to him the property for purchase, was a mere *moral* behest or created a legal obligation. I have already shown how Muhammadan jurists dealt with the right of pre-emption, and the method of arguing which they adopted had, no doubt, considerable influence in the interpretation of these two traditions. The difference of phraseology, which I have already indicated, enabled them to put such an interpretation as would render the traditions consistent with the rule that the absence of the pre-emptor's consent does not vitiate the sale—the rule which had been unanimously adopted by the jurists. This is best shown by Nawavi, a celebrated Commentary on Muslim, in which these traditions occur. The other explains the traditions in the following manner:—The saying of the Prophet to the effect that it is not for him (the vendor) to sell until he has apprised his co-parcener is, in the opinion of our doctors, taken to refer to the *moral* propriety of giving notice and to the objectionableness of sale before such notice—an objectionableness which arises from impropriety. It does not, however, mean that such sale is "*absolutely prohibited*," and this is the manner in which they have interpreted the *Hadis* (sayings of the Prophet), because it may be rightly affirmed of that which is morally objectionable, that it is not lawful, and thus the expression "lawful" comes to mean permissible, which implies that both sides (positive and negative) are on an equal footing, whilst that which is "*morally objectionable*" cannot be said to be permissible, both sides of which are equal, but, on the contrary, the "*morally objectionable*" is that the rejection of which prevails (over its adoption).

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It is not necessary to pursue any further the syllogistic manner in which such questions were dealt with by Muhammadan jurists. I may, however, say that the ultimate reason which prevented them from interpreting these traditions in the sense of creating a *legal* obligation imposed upon the vendor was, that the language of the tradition being capable of two interpretations, they adopted the more lenient one, acting upon the presumption that a *legal* obligation does not exist till expressly provided, and that all contracts are lawful unless expressly prohibited by law. The law, therefore, as it stands, does not oblige the vendor to give notice of the projected sale to the pre-emptor, nor does it vitiate a sale executed without his permission I am not at liberty to interpret the sayings of the Prophet in a sense other than that adopted by the recognized authorities on Muhammadan jurisprudence. But it is perfectly clear from these traditions that the very conception of pre-emption in Muhammadan Law necessarily involves the existence of the right before the sale in respect of which it may be exercised. All that the interpretation of the Muhammadan jurists goes to show is, that the sale is not vitiated by the absence of the pre-emptor's consent—an interpretation which, whilst it is perfectly consistent with the rest of their method of reasoning in dealing with pre-emption, again falls short of establishing the proposition that the *right* is not *antecedent* in existence to the sale complained of by the pre-emptors.

I have now to deal with the argument that the right of pre-emption under the Muhammadan Law is "*a mere right of re-purchase*, not from the *vendor*, but from the *vendee*." I trust what I have already said goes far to show that this conclusion cannot be right. If by the expression "re-purchase" is meant the institution of a new contract of sale other than that entered into by the vendor and the vendee, the hypothesis becomes obviously erroneous, because the entire argument, that the vendor of a pre-emptional tenement conveys an *absolute* ownership to the vendee unhampered by any defect of title arising out of pre-emption, applies as much to a Muhammadan as to a Hindu vendee. And if the right of pre-emption is only a right of re-purchase, and if the right is to be enforced, *not as a rule of law*, but only by reason of the rule of justice, equity, and good conscience, I fail to see, even in a case where all

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the parties are Muhammadans, where the equity lies in forcing a man to sell that which is *absolutely* his own to a man who had no right in connection with it at the time when the title of the *vendee* was created. Equity is higher than the considerations of race and creed, nor will it allow parties to impose upon each other rules not sanctioned by the *law*. And if its rules prohibit a Hindu purchaser from being deprived of property of which he is the absolute owner, that same rule should, by ordinary legal analogy, benefit also a Muhammadan purchaser of property whose title is, *ex hypothesi*, as *absolute* and as free from defect as that of the Hindu vendee. Further, if pre-emption is only a right of "*re-purchase*" from the vendee who, *ex hypothesi*, has, under the sale derived an *absolute* title, unhampered by the pre-emptive right, there is no reason which would prevent the vendee from insisting that the terms of the new sale should be other than those under which he himself purchased. That this would be the necessary consequence of the hypothesis, seems to me to be as clear as the proposition that every *absolute* owner is at full liberty to sell or not to sell his property, and that if he chooses to sell it, he can make his own terms as to the bargain of sale. That such a result is not only not warranted by the Muhammadan Law of pre-emption, but would positively strike at the very root of the right itself, seems to be too obvious to require any explanation. But the Muhammadan Law of pre-emption involves no such anomalous inconsistencies of reasoning, because the right of pre-emption is not a right of "*re-purchase*" either from the *vendor* or from the *vendee*, involving any new contract of sale; but it is simply a right of *substitution*, entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee in respect of all the rights and obligations arising from the sale under which he has derived his title. It is, in effect, as if in a sale-deed the vendee's name were rubbed out and the pre-emptor's name inserted in its place. Otherwise, because every sale of a pre-emptional tenement renders the right of pre-emption enforceable in respect thereto, every successful pre-emptor obtaining possession of the property, by the so-called "*re-purchase*" from the vendee, would be subject to another pre-emptive claim, dating, not from the original sale, but from such "*re-purchase*"—a state of things most easily conceivable where

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the new claimant is a pre-emptor of a higher degree than the pre-emptor who has already succeeded. The result would be that pre-emptive litigation could never end.

I could go on at much greater length to show that the hypothesis that pre-emption is only "a right of *re-purchase* from the vendee," would involve even greater anomalies inconsistent with the fundamental rules of the right of pre-emption. But I need not pursue the argument any further, because it seems to me that the general principles of jurisprudence suggest the same conclusions as those at which I have arrived. I take it as a fundamental principle that no state of things can give rise to cause of action, such as can be sued upon in a Court of justice, unless there is a right and an infringement of that right—the right being *necessarily antecedent* to the injury. My conceptions of jurisprudence prevent me from conceiving any kind of right of which both the *inception* and the *infringement* depend upon one and the same incident. And it would be absurd to conceive a right of which the infringement takes place *before* the *inception* of the right itself. And if I am right so far, how would the right of pre-emption stand these tests, if it be taken not to exist before the sale in respect of which it is to be exercised? The *injury* to the right is the *intrusion* of a stranger under a sale, and the whole *object* of the right is to prevent such intrusion. And how could such intrusion be legally prevented if the right did not exist before the intrusion? Similar difficulties will arise if it be assumed that the point of the inception of the pre-emptive right is not *s le*, but "*talab*," that is, demand of pre-emption by the pre-emptor. There can be no legal de nand of a right which does not exist, nor could refusal by the vendee to surrender the pre-emptional property constitute any legal injury where no legal right existed.

But apart from the reasoning suggested by the analogy of jurisprudential conceptions, it seems to me that, if it is once conceded that the sole object of the pre-emptive right is to prevent the intrusion of strangers objectionable to the pre-emptor, it follows, I should say as a matter of "common sense," that if a Muhammadan pre-emptor can by the exercise of his pre-emptive right prevent the intrusion of another Muhammadan, he should, *á fortiori*, be able to do so in the case of a

purchaser who belongs to a different race and creed, for, *ceteris paribus*, it may be taken that a non-Muhammadan purchaser under such conditions would be more objectionable to the Muhammadan pre-emptor, and would demand a more strenuous exercise of the pre-emptive right.

Besides these arguments there is much on the subject of conflict of laws in the judgments delivered by Norman and Macpherson, JJ., in *Sheikh Kudratulla* v. *Mohini Mohan Shaha*,[1] which I might adopt in support of my view. But it is unnecessary to repeat the arguments which those learned Judges have already expressed with such force and lucidity. It, however, remains for me to deal with the reasoning adopted by Mitter, J., as to pre-emption being a right "feeble and defective," because, on the one hand, it is lost if not immediately asserted, and, on the other hand, it can be defeated by "tricks and artifices." If "*feeble and defective*" only means that the right of pre-emptor is *transitory* in the sense of requiring immediate assertion, I can understand the phrase. But I do not understand how the transitory character of the right can affect the question whether or not it should be enforced against a Muhammadan vendee and not against a non-Muhammadan. So far as this particular point is concerned, it seems enough to say that, if the right is legally enforceable against the one, it should be enforceable against the other. On the other hand, in one sense, full ownership itself may be called transitory, because if A, being the owner of X, allows B to sell it to C, A being present at the time of the sale, his mission to assert his title in X would, in effect, by the doctrine of estoppel, defeat his right in X. Pre-emption is feeble in a sense not dissimilar in principle to the illustration which I have given. The object of the Muhammadan Law in rendering the immediate demand of pre-emption a condition precedent to the exercise of the right, is to render it obligatory upon the pre-emptor to give the earliest possible notice to the vendee not to rely upon his purchase for making improvements, etc., or otherwise dealing with the purchased property. The rule is a very salutary restriction of right, which might otherwise be very capriciously enforced under a system of law which recognized no rule as to the

[1] 4 B. L. R., 134.

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limitation period for enforcing claims. Indeed, the rule rests much upon the same considerations as the doctrine of "*notice*" and the principle of acquiescence amounting to estoppel in equity jurisprudence. But such restrictions do not derogate from the right of pre-emption any more than another equitable rule of the same right, that the pre-emptor, in enforcing his right, cannot break up the bargain of sale by pre-empting only a portion of the property sold to one purchaser. The law of pre-emption is full of equitable considerations of this nature, but it is scarcely necessary to pursue the argument any further.

This brings me to the last point. Considerable portions of the judgments in *Sheikh Kudratulla's* case [1] are devoted to showing that the right of pre-emption can be defeated by what Mitter, J., calls "tricks and artifices," which Peacock, C. J., held are recognized and allowed by Muhammadan Law; and from this it is inferred (though I confess, with due respect, I am not able to follow the reasoning) that the right is not enforceable against a Hindu purchaser, though enforceable against a Muhammadan. If any question of the "tricks and artifices" referred to were involved in this case, I should have a good deal to say on the subject, but here I need only say once more that in dealing with questions of Muhammadan Law, the distinction between moral behests and legal duties on the one hand, and between rules of substantive law and procedure on the other, must always be borne in mind. And I think I may safely say that most if not all the notions about the efficacy of these "tricks and devices" arise from overlooking these distinctions. Peacock, C. J., says (p. 173):—"The Muhammadan Law, as has been already shown by Mr. Justice Kemp and Mr. Justice Mitter, admits of all kinds of devices for the purpose of frustrating its own law. If there is a *bonâ fide* sale between a Muhammadan vendor and a Hindu purchaser, and they come forward and declare that which is not true, and say that it was not a sale intended to operate, but was a fictitious device, their words must be accepted according to the Muhammadan Law, and the truth of the assertion cannot be disputed. They would be bound by the untruth which the vendor and the purchaser declare for the

[1] 4 B. L. R., 134.

purpose of evading the right of pre-emption. Can we say that if they will state an untruth, the Hindu shall remain in possession of the property which he has purchased; but if they will not declare that which is untrue, there is an equity to take the property away from the purchaser." The argument is consistent with certain passages in the text-books, which his Lordship went on to cite. But without attempting to explain the real reasons upon which those passages proceed, the argument may be fully answered by saying that, in the case supposed, the question whether there has been a *bonâ fide* sale or not is not a question of substantive law, but a mere question of fact, to be ascertained by the rules of that department of procedure which consists of the rules of evidence; and that we are no more bound to follow the Muhammadan Law of evidence in a pre-emptive suit than in a suit involving questions of succession or inheritance. The Muhammadan Law of evidence like other old systems, contains numerous rules which arose either from imperfect notions as to the distinction between the *weight* and *admissibility* of evidence, or from the rules of procedure, or from the political exigencies of the Muhammadan people, when those rules were formulated. The rule whether upon any particular point in a pre-emptive suit the statement of the pre-emptor, the vendor or the vendee is to be believed, is an illustration of the former part of this proposition, and the latter part may be exemplified by the disability imposed upon non-Muhammadans to give evidence against a Muhammadan in a Court of Justice, the reason being stated to be "that they have no power or authority over the Moslems, and are suspected of inventing falsehoods against them." But the Muhammadan Law of evidence is not the law of British India, and, whatever force the argument of Peacock, C. J., might have had in 1869, when his judgment was delivered, it can have no application now. For if it was intended as an enunciation of the Muhammadan Law of evidence, since that time a Code of evidence has been passed providing its own rules for ascertaining facts, and s. 2 of the enactment (Act I of 1872) has abolished all other rules of evidence. Similarly, it will be found upon close examination of the other devices to defeat pre-emption, referred to in the *Hedaya* and in Bailie's Digest, on which the learned Judges of the Calcutta Court relied, that they owe their origin to extremely technical rules of the

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Muhammadan Law of contract, procedure or evidence, in none of which departments of law are we bound by these technicalities. The Muhammadan substantive law, in matters governed by it, cannot, of course, be administered without ascertaining the facts to which it is to be applied. But how those facts are to be ascertained, is a matter relating to the remedy, *ad litis ordinationem*, for which the Courts in British India have their own rules. And there is in principle no more reason for saying that in a pre-emptive suit the questions, whether a valid *bonâ fide* sale has taken place or not, and if so, for what price, are governed by the Muhammadan Law, than there would be for saying that when a decree is passed under the Muhammadan Law for dower or inheritance, the process for executing that decree is to be regulated by the rules of procedure provided by that law. And, speaking generally, I may say that if it is once conceded that the technicalities of Muhammadan Law of contract, procedure or evidence are not binding upon us, it will be found that no "tricks and artifices" can defeat the pre-emptive right in our Courts. Such devices are held to be "*abominable*" even where the technicalities of Muhammadan adjective law might give them some plausible effect; and this is the prevalent doctrine, notwithstanding the opinion of Kazi Abu Yusuf, to be found in the passage from the *Hedaya* to which Kemp, J., has referred. The opinion of Imam Muhammad, given in that same passage, condemns all devices; but there being no such questions in this case, I need not discuss the matter any further. But I wish to add that I have considered it my duty to deal with this reference at such elaborate length, not only out of respect for the eminent authorities with whom I have ventured to differ in arriving at my conclusions, but also because the rapid rise in the value of landed property in British India has gone far to extend the exercise of the pre-emptive right and to enhance its importance by confirming it as an incident of the proprietary tenure. Moreover, the right, though it, no doubt, operates as a restriction of the principle of free sale, and thus tends to diminish the market-value of property, must have enough to recommend itself, for even in some of the most civilised parts of Germany, a similar right (*retractrecht*) is still maintained, either as a custom or as a rule of law. And if such is the case in a country where distinctions of race, caste, or creed do not prevail,

it seems to me that the right must not be lightly dealt with in a country like India, where the population presents quite the opposite state of things, and where the intrusion of a stranger as a co-sharer must not only give rise to inconvenience, but disturb domestic comfort, if not, as in some cases, lead to breach of the public peace.

My answer to this reference is in the affirmative.

OLDFIELD, J.—The answer should be in the affirmative. I concur in the opinion expressed in the case in *Chundo* v. *Hakeem Alim-ood-deen*,[1] by the majority of this Court, that by the provisions of s. 24, Act VI of 1871, the Court is not bound to administer the Muhammadan Law in claims of pre-emption, but on grounds of equity that law has always been held to bind Muhammadans, and has always been administered as between them in claims for pre-emption. Muhammadans, therefore, as between themselves, hold property subject to the rules of Muhammadan Law; and it would not be equitable that persons who are not Muhammadans, but who have dealt with Muhammadans, in respect of property, knowing perfectly well the conditions and obligations under which the property is held, should, merely by reason that they are not themselves subject to Muhammadan Law, be permitted to evade those conditions and obligations. I wish to add that although I was a party to *Moti Chand* v. *Mahomed Hossein Khan*,[2] my decision followed the Full Bench ruling in *Chundo* v. *Hakeem Alim-ood-deen*[1] by which I felt myself bound.

BRODHURST, J., concurred.

PETHERAM, C. J.—My answer to the question referred to the Full Bench is in the affirmative. There appears to be no doubt as to what the rule of Muhammadan Law is. It imposes an obligation upon a Muhammadan owner of property, in the neighbourhood of which other Muhammadans have property, or in respect of which other Muhammadans have a share, to offer it to his neighbours or his partners before he can sell it to a stranger. This is an incident of his property, as the text-books of the

[1] N.-W. P. H. C. R., 1874, p. 28.
[2] N.-W. P. H. C. R., 1875, p. 147.

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Muhammadan Law show, and, for the reasons stated by my brother Oldfield, I think that it is equitable to apply the rule to cases like the present, in which the purchaser is a Hindu.

DUTHOIT, J., concurred.

LAW RELATING TO PERSONS.

GEORGE UDNY

v.

JOHN HENRY UDNY.

[*Reported in L. R., 1 H. L. (Sc. & D.), 441.*]

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June, 3.

The following opinions of the Law Peers fully state the facts, the authorities, and the legal reasoning.

THE LORD CHANCELLOR.[1]—My Lords—in this case the appellant prays a judicial declaration that the respondent is a bastard, and is not entitled to succeed to the entailed estates of Udny in Aberdeenshire.

The question depends upon what shall be determined to have been the domicil of the respondent's father, the late Colonel Udny, at the time of his birth,—at the time of the respondent's birth,—and at the time of the Colonel's marriage with the respondent's mother.

The appellant, who argued his case in person with very considerable ability, contended:—*First*: That the domicil of origin of Colonel Udny was English. *Secondly*: That even if that were not so, yet that at the time of his first marriage, in 1812, he had abandoned Scotland for England, sold his commission in the army, took a house on lease for a long term in London, and resided there till he left England for France in 1844, for the purpose of avoiding his creditors; and that, having thus acquired an English domicil, he retained it, and never re-acquired his Scotch domicil. *Thirdly*: That, at all events, if he did recover his Scotch domicil, yet it was not recovered at the date of the respondent's birth in May, 1853, nor even at the date of the intermarriage of the respondent's parents in January, 1854.

As regards the first question, your Lordships did not hear the respondents. You were satisfied that Colonel Udny's father,

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the Consul, had never abandoned his Scottish domicil. Consequently you held that Colonel Udny's own domicil of origin was clearly Scotch, that having been the domicil of his father at the Colonel's birth.

A more difficult inquiry arose as to the domicil of Colonel Udny at the date of the respondent's birth in May, 1853.

Colonel Udny appears to have left the army about the same time that he married his first wife, *viz.*, in 1812, when he executed a contract and other instruments connected with his marriage, containing provisions referable to Scottish law, and describing himself as of *Udny, in the county of Aberdeen*. He, on his marriage, however, took a long lease of a house in London, in which he resided till 1844. He made frequent visits to Scotland, but had no residence there. He at one time contemplated restoring Udny Castle—and even three years after he had commenced his residence in London, appears to have still thought it possible that he might complete the restoration—and plans were about that time submitted to him for that purpose. For many years, however, he seems to have abandoned all hope of so doing, owing to his means being insufficient. He was appointed a Magistrate in Scotland, but appears not to have acted as such. When in Scotland, he usually resided with friends, but occasionally at hotels in the neighbourhood of his property; and he continually received detailed accounts of the estates, and took much interest in their management. His choice of England as a residence appears to have been considerably influenced by his taste for the sports of the turf. By his first marriage he had a son, John Augustus Udny.

The Judge Ordinary and the Court of Session concurred in opinion that the long and habitual residence in England was not sufficient to amount to an abandonment of the Colonel's Scottish domicil of origin. This point, I confess, appears to me to be one of great nicety. I am not prepared to say that I am satisfied with that conclusion; but neither should I be prepared, without further consideration, to recommend to your Lordships a reversal of the judgment appealed from on the ground that the opinions of the Court below upon this point were erroneous.

Owing to this action having been raised in the Colonel's lifetime, the Court below had the advantage of the testimony

of Colonel Udny himself, a circumstance which does not often occur in questions of domicil. It appears to have been very candidly given, and (as was observed by the Lord Ordinary) by no means over-states the case in favour of the continuance of his Scottish domicil.

Several other witnesses were examined, who do not carry the case further. But, be this as it may, the events in the Colonel's life, subsequent to 1844, appear to me to be those upon which the question of his domicil at the birth of the respondent really depend.

In 1844, the Colonel, after having been involved for some time in pecuniary difficulties (owing chiefly to his connection with the turf), was compelled to leave England, in order to avoid his creditors. He, at first, thought of taking some house "in the country," by which I think he meant in the rural parts of England; but afterwards the pressure of creditors became too great to admit of his so doing, and he appears, in the autumn, to have visited Scotland, where correspondence took place between himself and his agent as to arranging a trust deed by which Colonel Udny and his son, John Augustus, were to make provision, as far as possible, for the payment of their debts. On the 2nd of October, he writes to his agent, mentioning that a creditor is pressing for immediate payment of £1,200—"So let there be no time lost." And by a letter of his son of the 4th of November, 1844, it appears that his father had left England for Calais on the previous day. He about this time sold the lease of the London house in which he had so long resided. He sold also (as he himself states in his evidence) all his furniture and "everything that was in the house, including what had belonged to his mother, his sister, and his first wife." He went from Calais to Boulogne, and there resided in a hired house till 1853. He says in his evidence:

"When I went to Boulogne, I had no further connection with London. I had a married sister, living there, and various other relations. During the nine years when my head-quarters were at Boulogne, I never resided in London. The time that I came over for my wife's confinement in 1853 was the first time that I had visited London after leaving it for Boulogne. I remained there at that time only about a couple of days, and returned to Boulogne. While I was at Boulogne, I came over

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more than once to Scotland to visit my property. These were not long visits, but I did make them."

The wife, alluded to in the above statement, is the mother of the respondent. The Colonel's first wife did not go with him to Boulogne, but she joined him for a short time in 1845, leaving him afterwards on account of ill-health, and residing with his brother in London. She died in 1846.

The Colonel at Boulogne formed an illicit connection with the mother of the respondent, and in May, 1853, came to England in consequence of a wish that she should be attended in her confinement by an English accoucheur; and on the 9th of May, 1853, the respondent was born at Camberwell. The Colonel appears to have returned almost immediately to Boulogne. He had been living on a very scanty allowance—his eldest son, too, was embarrassed—and at a very early period after the birth of the respondent the father and son appear to have thought that the birth of this child might facilitate the bearing of the entail of the Scotch estates; for, in a letter of the 29th of May, 1853, the Colonel writes to his son, "I shall be glad to hear of your interview with Mr. Skinner" (their legal adviser). "I think the great difficulty will be the uncertainty of the child's life; however, you will talk over all these matters with him."

The Colonel was advised that, by marrying the respondent's mother, he might, according to the law of Scotland, render the respondent legitimate, and that, then, the concurrence of the appellant in barring the entail would not be requisite. The advice on this latter point was erroneous; but it is enough to say that the Colonel came over to Scotland in November, 1853, clearly with the intent to celebrate a marriage with the respondent's mother, and with the hope of raising money for the benefit of his elder son and himself by getting rid of the entail. He was under an impression that his English creditors could not molest him whilst in Scotland. He was much mortified afterwards to find that this was not the case, and wrote several letters to his son and others expressive of his disgust at having been hurried away from Boulogne, and his dislike to residing in Scotland. But I cannot bring my mind to doubt that his intention in returning to Scotland was to do that which he accomplished, namely, to marry, in regular form, the respondent's mother, and for that purpose to be domiciled there.

In his letter of the 9th of July, 1859, he expressly asserts it to have been his intention in 1853 to be permanently domiciled in Scotland; but that letter may be open to the objection that it was written very shortly *ante litem motam*(a). I do not think that we can safely rely on the deed of disposition by his elder son of the 2nd of December, 1853, which recites "that the Colonel had made arrangements to return again to, and to remain in Scotland," because the father was not a party to that instrument. But, on the other hand, though the recital itself may not be evidence, yet the Colonel took advantage of that instrument. And the whole course of the arrangements made shews that the Colonel's intent, for which alone he came to Scotland, was by his marriage to make the respondent legitimate, and by means of that legitimation to deal with the estates. These objects required a Scottish domicil; and it would be singular to hold that he having, in fact, married on the 2nd of January, 1854, and resided in Scotland thenceforth to his death in 1861 (after the raising of the present action), the domicil must not be taken to have been Scottish, as it ought to be, for the purposes he had in view from the time of his return in 1853. It is true that the death of his elder son in the interval between the marriage and death of the Colonel, and the consequent falling in of the policies of insurance on his life, placed the Colonel to a certain degree in an easier position, and removed his apprehension of difficulty from his creditors: but I think his possible intention to leave Scotland (if molested by creditors) in no way disproves the existence of a resolution to remain, as he did, in that country (if allowed so to do) as his chosen and settled abode.

It seems, therefore, clear to me that the Colonel was, at the time of his marriage, domiciled in Scotland; but the question remains as to what was his domicil in May, 1853, at the time of the respondent's birth.

If he were domiciled in England up to 1844, and retained an English domicil up to, and after, May, 1853, then the question would arise, which has not been determined in any case by the Scottish Courts, whether the child, being illegitimate at its birth, and its putative father not having at that time a power of legitimating him by means of a subsequent marriage with his mother,

(a) See note at the end of the case.

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could be legitimated by his putative father subsequently *acquiring* a Scottish domicil before marriage with the mother.

I have myself held, and so have other Judges in the English Courts, that, according to the law of England, a bastard child whose putative father was English at its birth could not be legitimated by the father afterwards acquiring a foreign domicil and marrying the mother in a country by the law of which a subsequent marriage would have legitimated the child. I see no reason to retract that opinion. The *status* of the child,—with respect to its capacity to be legitimated by the subsequent marriage of its parents,—depends wholly on the *status* of the putative father, not on that of the mother. If the putative father have an English domicil, the English law does not, at the birth of the child, take notice of the putative father's existence. But if his domicil be Scottish, or of any other country allowing legitimation, though the mother be English at the birth, the putative father, as in *Munro* v. *Munro*,[1] is capable of legitimating the child. The foreign law, though deeming the child to be *filius nullius* (*b*) at birth, yet recognises the father as such at the moment of his acknowledging the child, either by marriage and formal recognition, as in France, or by marriage only, as in Scotland. I do dot think that the English law can recognise a capacity in any Englishman, by a change of domicil, to cause his paternity and consequent power of legitimation to be recognised. But, however, this may be, the question does not, in my judgment, here arise.

I am of opinion that the English domicil of Colonel Udny, if it were ever acquired, was formally and completely abandoned in 1844 when he sold his house and broke up his English establishment with the intention not to return. And, indeed, his return to that country was barred against him by the continued threat of process by his creditors. I think that, on such abandonment, his domicil of origin revived. It is clear that by our law a man must have some domicil, and must have a single domicil. It is clear, on the evidence, that the Colonel did not contemplate residing in France—and, indeed, that has scarcely been contended for by the appellant. But the appellant contends that, when once a new domicil is acquired, the domicil of origin is obliterated, and cannot be re-acquired

[1] 7 Cl. & F., 842.

more readily or by any other means than those by which the first change of the original domicil is brought about, namely, *animo et facto* (*e*). He relied for this proposition on the decision in *Munroe* v. *Douglas*,[1] where Sir John Leach certainly held that a Scotsman, having acquired an Anglo-Indian domicil, and having finally quitted India, but not yet having settled elsewhere, did not re-acquire his original domicil; saying expressly, "I can find no difference in principle between an original domicil and an acquired domicil." That he acquired no new domicil may be conceded, but it appears to me that sufficient weight was not given to the effect of the domicil of origin, and that there is a very substantial difference in principle between an original and an acquired domicil. I shall not add to the many ineffectual attempts to define domicil. But the domicil of origin is a matter wholly irrespective of any animus on the part of its subject. He acquires a certain *status civilis* (*d*), as one of your Lordships has designated it, which subjects him and his property to the municipal jurisdiction of a country which he may never even have seen, and in which he may never reside during the whole course of his life, his domicil being simply determined by that of his father. A change of that domicil can only be effected *animo et facto* (*e*) that is to say, by the choice of another domicil, evidenced by residence within the territorial limits to which the jurisdiction of the new domicil extends. He, in making this change, does an act which is more nearly designated by the word "settling" than by any one word in our language. Thus we speak of a colonist settling in Canada or Australia, or of a Scotsman settling in England, and the word is frequently used as expressive of the act of change of domicil in the various judgments pronounced by our Courts. But this settlement *animo et facto* (*e*) by which the new domicil is acquired is, of course, susceptible of abandonment if the intention be evidenced by facts as decisive as those which evidenced its acquirement.

It is said by Sir John Leach, that the change of the newly acquired domicil can only be evidenced by an actual settling elsewhere, or (which is, however, a remarkable qualification) by the subject of the change dying *in itinere* (*e*) when about to settle himself elsewhere. But the dying *in itinere* (*e*) to a wholly new domicil would not, I apprehend, change a domicil of origin if the

[1] 5 Madd., 379.

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intended new domicil were never reached. So that at once a distinction is admitted between what is necessary to re-acquire the original domicil and the acquiring of a third domicil. Indeed, the admission of Sir John Leach seems to have been founded on the actual decision of the case of *Colville* v. *Saunders*, cited in full in *Munroe* v. *Douglas*,[1] from the Dictionary of Decisions. In that case, a person of Scottish origin became domiciled at St. Vincent, but left that island, writing to his father and saying that his health was injured, and he was going to America; and that, if he did not succeed in America, he would return to his native country. He was drowned in Canada, and some memoranda were found indicating an intention to return to Scotland, and it was held that his Scottish domicil had revived.

It seems reasonable to say that, if the choice of a new abode and actual settlement there constitute a change of the original domicil, then, the exact converse of such a procedure, *viz.*, the intention to abandon the new domicil, and an actual abandonment of it, ought to be equally effective to destroy the new domicil. That which may be acquired may surely be abandoned, and though a man cannot, for civil reasons, be left without a domicil, no such difficulty arises if it be simply held that the original domicil revives. That original domicil depended not on choice, but attached itself to its subject on his birth, and it seems to me consistent both to convenience and to the currency of the whole law of domicil to hold that the man, born with a domicil, may shift and vary it as often as he pleases, indicating each change by intention and act, whether in its acquisition or abandonment; and further, to hold that every acquired domicil is capable of simple abandonment *animo et facto* (*c*) the process by which it was acquired, without its being necessary that a new one should be at the same time chosen, otherwise one is driven to the absurdity of asserting a person to be domiciled in a country which he has resolutely forsaken and cast off, simply because he may (perhaps for years) be deliberating before he settles himself elsewhere. Why should not the domicil of origin cast on him by no choice of his own, and changed for a time, be the state to which he naturally falls back when his first choice has been abandoned *animo et facto* (*c*), and whilst he is deliberating before he makes a second choice.

[1] 5 Madd., 379.

Lord Cottenham, in *Munro* v. *Munro*,[1] says: "So firmly indeed did the civil law consider the domicil of origin to adhere that it holds that if it be actually abandoned and a domicil acquired, but that again abandoned, and no new domicil acquired in its place, the domicil of origin revives." No authority is cited by his Lordship for this. He probably alluded to some observations which occur in the case of *La Virginie*[2] where Sir William Scott said:

"It is always to be remembered that the native character easily reverts, and that it requires fewer circumstances to constitute domicil in the case of a native subject than to impress the national character on one who is originally of another country."

In the case of *The Indian Chief*[3] the question was whether the ship was the property of a British subject; for if so, her trading was illegal. The owner, Mr. Johnson, averred that he was an American. Sir William Scott held him to be an American by origin, but that, having come to England in 1783 and remained till 1797, he had become an English merchant. But he quitted England before the capture of the vessel, and letters were produced shewing his intention to return to America, which he does not appear to have reached until after. And Sir William Scott says: "The ship arrives a few weeks after his departure, and taking it to be clear that the natural character of Mr. Johnson as a British merchant was founded on residence only, that it was acquired by residence, and rested on that circumstance alone, it must be held that from the moment he turned his back on the country where he had resided on his way to his own country he was in the act of resuming his original character, and is to be considered as an American. The character that is gained by residence ceases by residence. It is an adventitious character which no longer adheres to him from the moment that he puts himself in motion *bonâ fide* to quit the country *sine animo revertendi (f)*."

Story, in his Conflict of Laws, Sect. 47 (at the end), says: "If a man has acquired a new domicil different from that of his birth, and he removes from it with intention to resume his native domicil, the latter is re-acquired even while he is

[1] 7 Cl. & F. 842, at p. 871.
[2] 5 C. Rob. Adm., 99.
[3] 3 C. Rob. Adm., 12.

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on his way, for it reverts from the moment the other is given up."

The qualification that he must abandon the new domicil with the special intent to resume that of origin is not, I think, a reasonable deduction from the rules already laid down by decision, because intent not followed by a definitive act is not sufficient. The more consistent theory is, that the abandonment of the new domicil is complete *animo et facto* (*e*), because the *factum* is the abandonment, the *animus* is that of never returning.

I have stated my opinion more at length than I should have done, were it not of great importance that some fixed common principles should guide the Courts in every country on international questions. In questions of international law, we should not depart from any settled decisions, nor lay down any doctrine inconsistent with them. I think some of the expressions used in former cases as to the intent "*exuere patriam*" (*g*), or to become a Frenchman instead of an Englishman, go beyond the question of domicil. The question of naturalization and of allegiance is distinct from that of domicil. A man may continue to be an Englishman, and yet his contracts and the succession to his estate may have to be determined by the law of the country in which he has chosen to settle himself. He cannot, at present at least, put off and resume at will obligations of obedience to the government of the country of which at his birth he is a subject, but he may many times change his domicil. It appears to me, however, that each acquired domicil may be also successively abandoned *simpliciter*, and that thereupon the original domicil *simpliciter* reverts.

For these reasons, my Lords, I propose to your Lordships the affirmation of the interlocutors complained of, and the dismissal of the appeal with costs.

Lord Chelmsford.—My Lords, at the opening of the argument of this appeal for the respondent, his learned counsel were informed that your Lordships were of opinion that the domicil of Colonel Udny down to the year 1812 was his Scotch domicil of origin, and that the case was therefore narrowed down to the questions raised by the appellant,—whether that domicil had been superseded by the acquisition of another domicil in England, and whether such after-acquired domicil

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was retained at the time of the birth of the respondent, and continued down to the period of the marriage of the respondent's parents in Scotland.

In considering these questions, it will be necessary to ascertain the nature and effect of a domicil of origin: whether it is like an after-acquired domicil, which, when it is relinquished, can be re-acquired only in the same manner in which it was originally acquired, or whether, in the absence of any other domicil, the domicil of origin must not be had recourse to for the purpose of determining any question which may arise as to a party's personal rights and relations.

Story, in his Conflict of Laws (Sect. 48), says: "The moment a foreign domicil is abandoned the native domicil is re-acquired." Great stress was laid by the appellant in his reference to this passage upon the word "re-acquired," which is obviously an inaccurate expression. For, as was pointed out in the course of the argument, a domicil of origin is not an acquired domicil, but one which is attributed to every person by law. The meaning of Story, therefore, clearly is, that the abandonment of a subsequently-acquired domicil *ipso facto* (*h*) restores the domicil of origin. And this doctrine appears to be founded upon principle, if not upon direct authority.

It is undoubted law that no one can be without a domicil. If, then, a person has left his native domicil and acquired a new one, which he afterwards abandons, what domicil must be resorted to to determine and regulate his personal *status* and rights? Sir John Leach, V. C., in *Munroe* v. *Douglas*,[1] held that in the case supposed, the acquired domicil attaches to the person till the complete acquisition of a subsequent domicil, and as to this point he said there was no difference in principle between the original domicil and an acquired domicil. His Honour's words are: "A domicil cannot be lost by mere abandonment. It is not to be defeated *animo* merely, but *animo et facto* (*e*), and necessarily remains until a subsequent domicil be acquired, unless the party die *in itinere* (*e*) towards an intended domicil." There is an apparent inconsistency in this passage, for the Vice-Chancellor having said that a domicil necessarily remains until a subsequent domicil be acquired *animo et facto* (*e*) added, "unless the party die *in itinere* (*e*) towards an intended domicil";

[1] 5 Madd., 379, at p. 405.

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that is, at a time when the acquisition of the subsequent domicil is incomplete and rests in intention only.

I cannot understand upon what ground it can be alleged that a person may not abandon an acquired domicil altogether and carry out his intention fully by removing *animo non revertendi* (*i*); and why such abandonment should not be complete until another domicil is acquired in lieu of the one thus relinquished.

Sir William Scott, in the case of *The Indian Chief*,[1] said: "The character that is gained by residence ceases by residence. It is an adventitious character which no longer adheres to a person from the moment he puts himself in motion *bonâ fide* to quit the country *sine animo revertendi* (*f*)," and he mentions the case of a British-born subject, who had been resident in Surinam and St. Eustatius, and had left those settlements with an intention of returning to this country, but had got no farther than Holland, the mother country of those settlements, when the war broke out; and it was determined by the Lords of Appeal that he was *in itinere* (*e*), that he had put himself in motion, and was in pursuit of his native British character."

Sir John Leach seems to me to be incorrect also in saying that in the case of the abandonment of an acquired domicil there is no difference in principle between the acquisition of an entirely new domicil and the revival of the domicil of origin. It is said by Story, in Sec. 47 of his Conflict of Laws, that "If a man has acquired a new domicil different from that of his birth, and he removes from it with an intention to resume his native domicil, the latter is re-acquired even while he is on his way *in itinere* (*e*); for it reverts from the moment the other is given up." This certainly cannot be predicated of a person journeying towards a new domicil which it is his intention to acquire.

I do not think that the circumstances mentioned by Story in the above passage, *viz.*, that the person has removed from his acquired domicil with an intention to resume his native domicil, and that he is *in itinere* (*e*) for the purpose, are at all necessary to restore the domicil of origin. The true doctrine appears to me to be expressed in the last words of the passage: "It" (the domicil of origin), "reverts from the moment the other is given up."

[1] 3 C. Rob. Adm., 12, at p. 20.

This is a necessary conclusion, if it be true that an acquired domicil ceases entirely whenever it is intentionally abandoned, and that a man can never be without a domicil. The domicil of origin always remains, as it were, in reserve, to be resorted to in case no other domicil is found to exist. This appears to me to be the true principle upon this subject, and it will govern my opinion upon the present appeal.

Upon the question whether Colonel Udny ever acquired an English domicil which superseded his domicil of origin, there can be no doubt that his long residence in Grosvenor Street for the space of thirty-two years from 1812 to 1844, is calculated to produce a strong impression in favour of the acquisition of such a domicil. Time is always a material element in questions of domicil; and if there is nothing to counteract its effect, it may be conclusive upon the subject. But in a competition between a domicil of origin and an alleged subsequently-acquired domicil there may be circumstances to shew that however long a residence may have continued, no intention of acquiring a domicil may have existed at any one moment during the whole of the continuance of such residence. The question in such a case is not, whether there is evidence of an intention to retain the domicil of origin, but whether it is proved that there was an intention to acquire another domicil. As already shewn, the domicil of origin remains till a new one is acquired *animo et facto* (*c*). Therefore, a wish or a desire expressed from time to time to return to the place of the first domicil, or any looking to it as the ultimate home, although wholly insufficient for the retention of the domicil of origin, may yet amount to material evidence to rebut the presumption of an intention to acquire a new domicil arising from length of residence elsewhere. In this view it would be a fair answer to the question: Did Colonel Udny intend to make England his permanent home? To point to all his acts and declarations with respect to Scotland and his estates there, to the offices which he held, to the institutions to which he belonged, and to his subscriptions to local objects, shewing, that though his pursuits drew him to England and kept him there, and his circumstances prevented his making Udny Castle fit for his residence, he always entertained a hope, if not an expectation, that a change in his fortunes might eventually enable him to appear in his country of

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origin, and to assume his proper position there as a Scotch proprietor.

If the residence in England began under circumstances which indicate no intention that it was to be permanent, when did it assume the character of permanence by proof that the Colonel had intentionally given up his Scotch domicil and adopted a different one? It appears to me upon this question of fact, that, throughout the whole of the Colonel's residence in London, there was always absent the intention to make it his permanent home which is essential to constitute a domicil; residence alone, however long, being immaterial unless coupled with such intention. But even if it should be considered that Colonel Udny's residence in England, though not originally intended to be his permanent home, after a certain length of time ripened into a domicil, yet in 1844 he gave up the house in Grosvenor Street and returned to Boulogne, where he remained for nine years without any apparent intention of again taking up his residence in England. This abandonment of the English residence, both in will and deed, although accompanied with no immediate intention of resuming the Scotch domicil, put an end at once to the English domicil, and the domicil of origin *ipso facto* (*h*) became the domicil by which the personal rights of Colonel Udny were thenceforth to be regulated.

This makes it unnecessary to consider what would have been the condition of the respondent, if his birth had taken place in England before the resumption of the Scotch domicil by Colonel Udny, and the subsequent marriage of his parents in Scotland after that domicil had been resumed. Because the domicil being Scotch, the place of the birth of the respondent is wholly immaterial, and the case is completely governed by the authority of the cases, of *Dalhousie* v. *McDowall* [1] and *Munro* v. *Munro*,[2] in each of which, the birth of the illegitimate child, and also the subsequent marriage of the parents, took place in England, but the domicil being Scotch, it was held that neither the place of the marriage nor the place of the birth affected the *status* of the child.

The existence of the Scotch domicil renders it also unnecessary to consider whether the parents of the respondent went to Scotland for the purpose merely of legitimating the respondent

[1] 7 Cl. & F., 817. [2] 7 Cl. & F., 842.

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by their marriage there, and deprives the case of *Rose* v. *Ross*,[1] which was insisted upon by the appellant, of all application. For in that case, as stated by the Lord Chancellor, "the parties were domiciled in England, the child was born in England, the parties went to Scotland for the purpose expressly of being married, and having been married, they returned to England to the place of their former domicil."

I agree with my noble and learned friend that the interlocutors appealed from ought to be affirmed.

Lord Westbury.—The law of England, and of almost all civilized countries, ascribes to each individual at his birth two distinct legal states or conditions: one by virtue of which he becomes the subject of some particular country, binding him by the tie of natural allegiance, and which may be called his political *status*; another, by virtue of which he has ascribed to him the character of a citizen of some particular country, and as such is possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil *status* or condition of the individual, and may be quite different from his political *status*. The political *status* may depend on different laws in different countries; whereas the civil *status* is governed universally by one single principle, namely, that of domicil, which is the criterion established by law for the purpose of determining civil *status*. For it is on this basis that the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage, succession, testacy, or intestacy, must depend. International law depends on rules which, being in great measure derived from the Roman law, are common to the jurisprudence of all civilized nations. It is a settled principle that no man shall be without a domicil, and to secure this result the law attributes to every individual as soon as he is born the domicil of his father, if the child be legitimate, and the domicil of the mother, if illegitimate. This has been called the domicil of origin, and is involuntary. Other domicils, including domicil by operation of law, as on marriage, are domicils of choice. For as soon as an individual is *sui juris* (*j*) it is competent to him to elect and assume another domicil, the continuance of which depends upon his will and act. When another domicil is put on, the domicil of origin is for that purpose relinquished, and

[1] 4 Wils. & Shaw, 289.

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remains in abeyance during the continuance of the domicil of choice; but as the domicil of origin is the creature of law, and independent of the will of the party, it would be inconsistent with the principles on which it is by law created and ascribed, to suppose that it is capable of being by the act of the party entirely obliterated and extinguished. It revives and exists, whenever there is no other domicil, and it does not require to be regained or reconstituted *animo et facto* (*c*), in the manner which is necessary for the acquisition of a domicil of choice.

Domicil of choice is a conclusion or inference, which the law derives from the fact of a man, fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicil, and not a definition of the term. There must be a residence, freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness; and it must be residence fixed not for a limited period or particular purpose, but general and indefinite in its future contemplation. It is true that residence originally temporary, or intended for a limited period, may afterwards become general and unlimited, and in such a case so soon as the change of purpose, or *animus manendi* (*k*), can be inferred the fact of domicil is established.

The domicil of origin may be extinguished by act of law, as, for example, by sentence of death or exile for life, which puts an end to the *status civilis* (*d*) of the criminal; but it cannot be destroyed by the will and act of the party.

Domicil of choice, as it is gained *animo et facto* (*c*), so it may be put an end to in the same manner. Expressions are found in some books, and in one or two cases, that the first or existing domicil remains until another is acquired. This is true if applied to the domicil of origin, but cannot be true if such general words were intended (which is not probable) to convey the conclusion that a domicil of choice, though unequivocally relinquished and abandoned, clings, in despite of his will and acts, to the party, until another domicil has *animo et facto* (*c*) been acquired. The cases to which I have referred are, in my opinion, met and controlled by other decisions. A natural-born Englishman may,

if he domiciles himself in Holland, acquire and have the *status civilis* (*d*) of a Dutchman, which is, of course, ascribed to him in respect of his settled abode in the land, but, if he breaks up his establishment, sells his house and furniture, discharges his servants, and quits Holland, declaring that he will never return to it again, and taking with him his wife and children, for the purpose of travelling in France or Italy in search of another place of residence, is it meant to be said that he carries his Dutch domicil, that is, his Dutch citizenship, at his back, and that it clings to him pertinaciously until he has finally set up his tabernacle in another country? Such a conclusion would be absurd; but there is no absurdity, and, on the contrary, much reason, in holding that an acquired domicil may be effectually abandoned by unequivocal intention and act; and that, when it is so determined, the domicil of origin revives until a new domicil of choice be acquired. According to the *dicta* in the books and cases referred to, if the Englishman whose case we have been supposing lived for twenty years after he had finally quitted Holland, without acquiring a new domicil, and afterwards died intestate, his personal estate would be administered according to the law of Holland, and not according to that of his native country. This is an irrational consequence of the supposed rule. But when a proposition supposed to be authorised by one or more decisions involves absurd results, there is great reason for believing that no such rule was intended to be laid down.

In Mr. Justice Story's Conflict of Laws (last edition), it is stated that "the moment the foreign domicil (that is the domicil of choice) is abandoned, the native domicil or domicil of origin is re-acquired."

And such appears to be the just conclusion from several decided cases, as well as from the principles of the law of domicil.

In adverting to Mr. Justice Story's work, I am obliged to dissent from a conclusion stated in the last edition of that useful book, and which is thus expressed: "The result of the more recent English cases seems to be, that for a change of national domicil there must be a definite and effectual change of nationality." In support of this proposition the editor refers to some words which appear to have fallen from a noble and learnd Lord

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in addressing this House in the case of *Moorhouse* v. *Lord*,[1] when in speaking of the acquisition of a French domicil, Lord Kingsdown says, "A man must intend to become a Frenchman instead of an Englishman."

These words are likely to mislead, if they were intended to signify that for a change of domicil there must be a change of nationality, that is, of natural allegiance.

That would be to confound the political and civil states of an individual, and to destroy the difference between *patria* and *domicilium*.

The application of these general rules to the circumstances of the present case is very simple. I concur with my noble and learned friend that the father of Colonel Udny, the Consul at Leghorn, and afterwards at Venice, and again at Leghorn, did not by his residence there in that capacity lose his Scotch domicil. Colonel Udny was, therefore, a Scotchman by birth. But I am certainly inclined to think that, when Colonel Udny married, and (to use the ordinary phrase) settled in life and took a long lease of a house in Grosvenor Street, and made that a place of abode of himself and his wife and children, becoming, in point of fact, subject to the municipal duties of a resident in that locality, and when he had remained there for a period, I think, of thirty-two years, there being no obstacle in point of fortune, occupation, or duty, to his going to reside in his native country; under these circumstances, I should come to the conclusion, if it were necessary to decide the point, that Colonel Udny deliberately chose and acquired an English domicil. But if he did so, he as certainly relinquished that English domicil in the most effectual way by selling or surrendering the lease of his house, selling his furniture, discharging his servants, and leaving London in a manner which removes all doubt of his ever intending to return there for the purpose of residence. If, therefore, he acquired an English domicil, he abandoned it absolutely *animo et facto* (*c*). Its acquisition being a thing of choice, it was equally put an end to by choice. He lost it the moment he set foot on the steamer to go to Boulogne, and at the same time his domicil of origin revived. The rest is plain. The marriage and the consequences of that marriage must be determined by the law of Scotland, the country of his domicil.

[1] 10 H. L. C. 272.

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LORD COLONSAY.—I regard this case as one of very considerable importance, inasmuch as it has afforded an opportunity for bringing out, more clearly than has been done in any of the former cases, the radical distinction between domicil of origin and domicil of choice. The principles of that distinction and the facts have been so clearly put before the House, that I need do no more than express my concurrence.

NOTE.

(a) *Ante litem motam* : before the commencement of the controversy.
(b) *Filius nullius* : nobody's child.
(c) *Animo et facto* : by intention and fact.
(d) *Status civilis* : civil status.
(e) *In itinere* : on the way.
(f) *Sine animo revertendi* : without the intention of returning.
(g) *Exuere patriam* : to abandon one's country, *i.e.*, nationality.
(h) *Ipso facto* : by the very fact itself.
(i) *Animo non-revertendi* : intention of not returning.
(j) *Sui juris* : in full possession of one's own right.
(k) *Animus manendi* : intention of remaining.

HELEN SKINNER

v.

SOPHIA EVELINA ORDE.[1]

[*Reported in L. R. 4 P. C., 60; 14 Moo. I.A., 309.*]

1871.
December, 11.

Their Lordships' judgment having been reserved, was now delivered by

THE LORD JUSTICE JAMES.—This is an appeal from an order of the High Court of the North-West Provinces, in substance confirming an order of the Judge of the Court of Meerut, removing an infant ward and her property from the custody and guardianship of her mother, the appellant, and the alleged second husband of that mother.

The application was made to the Judge under the provisions of the Indian Act, No. IX, 1861, which are as follows:—

"1. Any relative or friend of a Minor who may desire to prefer any claim in respect of the custody or guardianship of such Minor, may make an application by petition, either in person or by a duly constituted Agent, to the principal Civil Court of original jurisdiction in the District, by which such application, if preferred in the form of a regular suit, would be cognizable, and shall set forth the grounds of his application in the petition. The Court, if satisfied by an examination of the petitioner, or his Agent, if he appear by Agent, that there is ground for proceeding, shall give notice of the application to the person named in the petition as having the custody or being in the possession of the person of such Minor, as well as to any other person to whom the Court may think it proper that such notice should be given, and shall fix as early a day as may be convenient for the hearing of the petition, and the determination of the right to the custody or guardianship of such Minor.

"2. The Court may direct that the person having the custody or being in possession of the person of such Minor shall produce him or her in Court, or in any other place appointed by the Court, on the day fixed for the hearing of

[1] *Present*:—SIR JAMES WILLIAM COLVILE, The Lord Justice JAMES, The Lord Justice MELLISH, SIR MONTAGUE EDWARD SMITH, and SIR ROBERT PORRETT COLLIER.

Assessor.—SIR LAWRENCE PEEL.

the petition, or at any other time, and may make such order for the temporary custody and protection of such Minor as may appear proper.

"3. On the day appointed for the hearing of the petition, or as soon after as may be practicable, the Court shall hear the statements of the parties, or their Agents, if they appear by Agents, and such evidence as they or their Agents may adduce, and thereupon shall proceed to make such order as it shall think fit in respect to the custody or guardianship of such Minor and the costs of the case."

The Judge, accordingly, after hearing the case presented to him, made an order, removing the ward from the custody of her mother. An appeal from this order was presented to the High Court, which Court pronounced the final order now complained of. The Act IX of 1861 gives no further appeal, but on the statement made to this Tribunal that the question really involved the religious education of a ward, special leave was given by Her Majesty, on the recommendation of this Board, to prosecute the appeal now to be disposod of.

Several English cases have been cited to their Lordships, and one is referred to and relied on in the judgment of the Judge of the Court of Meerut; and it is, obviously, of very great assistance to the Courts in India, and to this Board, to see how, in the exercise of a similar jurisdiction for the same object, the Courts in this country have thought it best to act for the protection and welfare of infant wards. The course of decision in the English and Irish Courts of Chancery has been such as to lay it down as a matter of positive law of the Court, that in the matter of religious education, great, and in the absence of controlling circumstances, paramount, weight should be given to the expressed or implied wishes of the deceased father. It was contended with some plausibility before their Lordships that this rule had its origin in the statutory power of English fathers to appoint guardians for their children.

However this may be, their Lordships do not think it necessary or desirable for the determination of this case, to refer to or rely on any such rule.

The Indian Act certainly does not expressly refer to any such right, and appears to have had one object in contemplation,

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the protection of the infant ward, and to have given the Judge (subject, of course, to appeal) the power and to have imposed on him the duty of doing what, in his judgment, is best for the infant; and no other power or duty.

In India, however, all, or almost all, the great religious communities of the world exist, side by side, under the impartial rule of the British Government. While Brahmin, Buddhist, Christian, Mahomedan, Parsee, and Sikh are one nation, enjoying equal political rights and having perfect equality before the Tribunals, they co-exist as separate and very distinct communities, having distinct laws affecting every relation of life. The law of husband and wife, parent and child, the descent, devolution, and disposition of property are all different, depending, in each case, on the body to which the individual is deemed to belong; and the difference of religion pervades and governs all domestic usages and social relations.

From the very necessity of the case, a child in India, under ordinary circumstances, must be presumed to have his father's religion, and his corresponding civil and social *status*; and it is, therefore, ordinarily, and in the absence of controlling circumstances, the duty of a guardian to train his infant ward in such religion.

What are the facts of the present case? Beyond all question the ward was the child of a Christian father, the issue of a Christian marriage. She was left an infant of very tender years, her father being one of the victims of the great outbreak and massacre at Delhi in the year 1857. She remained thenceforth under the protection of her mother, a lady, apparently, of ancestry not Christian, and with no great knowledge of Christian tenets, or attachment to Christian habits. But she was married to a Christian in a Christian church, and does not appear to have professed any other faith, or to have reverted in costume or customs to her ancestral faith until the autumn of 1867. The child up to that time had certainly been brought up and, so far as she was educated at all, educated as a Christian girl, eating, drinking and associating with her Christian cousins, and going to a school.

In the autumn of 1867 this occurred. The house of the widow became the house of one John Thomas John, a clerk of inferior grade in the Judge's Court, and they lived and co-habited together as husband and wife, John Thomas John being already

the husband in Christian marriage of a living Christian wife. It is suggested that this union was sanctified and legalized in this way—that the widow became a Mahomedan, that John Thomas John became a Mahomedan, and that, having thus qualified himself for the enjoyment of polygamous privileges, he contracted in Mahomedan form a valid Mahomedan marriage with the widow, the appellant.

The High Court expressed doubts of the legality of this marriage; which their Lordships think they were well warranted in entertaining.

But however this may be, their Lordships can entertain no doubt, that when the connection between John Thomas John and the widow was formed, whether it was merely adulterous or under the cover of a Mahomedan marriage, the home was no longer a fit home for a Christian young girl; and if the matter had then been brought to the notice of the Judge, it would have been his plain duty, without delay, to find a more suitable home and guardianship than what had become, in fact, the home and guardianship of John Thomas John. The matter was not, however, brought so soon as it ought to have been to the attention of the Judge.

Some relatives interfered, in order that the child might be sent to a proper school—a proper Christian school; and John Thomas John and his alleged wife, professing to yield to the suggestion, took the girl in June, 1869, up to Simla, with the avowed object of placing her at a Christian school there. They now represent that this project failed, by reason of the girl's refusal to go to school; and that she began to express a preference for the Mahomedan religion, and the Oriental mode of feminine life in seclusion behind the *purdah*; and that at some period (the time is not exactly fixed) a *Moulavie* was introduced, who confirmed her in her resolution to become a Mahomedan. The young lady, who by this time had attained the age of fourteen years, or thereabout, made the following deposition:

"I know Mr. John. I first knew him when we came to Meerut, and for the past two years know him well. No one has ever persuaded me to be a Mussulmani. My own feelings alone have prompted me. I wish to remain a Mussulmani. I would not be persuaded to become a Christian, because it is from my own conviction that I am a Mussulmani. I am in the

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purdah by my own free will. I went up to Simla with my mother and Mr. John. They wished me to go to school, and pressed me very much to go, but I would not consent. I heard of the marriage of my mother to Mr. John five or six days after it took place. I cannot say how long Mrs. James Skinner has known of the marriage, but she must have known of it a long time, as they have lived together for two years, and it has been matter of notoriety. I believe all Mrs. Skinner's family must have known of it. I wish to return to my mother. I believe Mrs. James Skinner to be a Mussulmani; Mrs. Orde to be a Christian. To counsel for petitioners.—My mother can read very little—small story-books; but she cannot read Persian, nor write at all. She can only read the Urdu in print, not the written character, excepting very good text-hand. I have read easy books on religion in Urdu, but not studied them. I am studying the Koran with a teacher. There was a picture of my father, and there were several other pictures; but as I had heard that it was strictly forbidden to keep pictures by our religion, I, therefore, destroyed them with my own hands. The picture was on paper in a frame with glass. It was destroyed soon after we returned from the hills. I heard that to keep pictures was prohibited after my return from the hills, from a preacher, a *Moulavie*, who came to the house and preached a sermon. No one advised me otherwise. I had long thought of becoming a Mussulmani, but, when I was young, did not understand the different religions; when I returned from the hills I turned my attention to it, and had the preacher called to preach. Almost all my family are Christians. I have had no intercourse during the last six or seven months with any others who are Christians, but their family and Mrs. Benu. Since I have been in their house I have not had any letter of any kind from Mr. John. I had some letters from my cousin Sophy, who is in Calcutta, and Charlie, which were on my table. These I sent for. Two from Charlie I sent for the day before yesterday, which were old, and I tore them up; the other from Sophy I sent for yesterday, and showed it to Mrs. Aldwell. The two from Charlie I sent for by Achakrai, and the one from Sophy by my Ayah. To counsel for petitioners.—I know Mrs. Benu. I have seen her several times since I came from Simla. I know her to be a Christian. This evidence was, with the

consent of the counsel on both sides, and also of the principal parties, though the questions and answers were put and given in the vernacular of the country, Urdu, recorded by the Court in English, and was read over to the witness in Urdu, and by her acknowledged to be correct."

The case of the appellant, in fact, rested on this deposition. An eloquent appeal was made to their Lordships' feelings not to sanction such a violation of the young lady's present religious convictions and natural feelings as was involved in tearing her from her Mahomedan home and mother, and committing her to the care of a Christian strange schoolmistress.

The Judges of the High Court, however, did not think that deposition sufficient to induce them to abstain from making in July, 1870, the order for the appointment of the guardian, which would have been the only possible order that could have been made in 1867.

Their Lordships cannot dissent from that conclusion. It would be very easy, of course, for a mother, under such circumstances, to procure from a young daughter the expression of a wish to remain with her and to become a Mahomedan like her, rather than continue a Christian and go to a strange school; and it is impossible, in their Lordships' judgment, to believe that in the interval which had occurred between the visit to Simla and the application to the Court any such knowledge of the differences between the two religions had been acquired, or any such settled conscientious convictions had been formed, as to make it really likely that her moral and religious condition would be endangered by placing her where she should receive the secular and religious instruction and training which she ought to have long previously and without interruption enjoyed. Their Lordships are, therefore, of opinion, that the order, in so far as it removed the ward from her mother and alleged step-father, and placed her under a Christian guardian, was right, and that is really the only matter that has been brought before them.

Their Lordships will humbly report to Her Majesty that in their opinion the order of the High Court ought to be affirmed, and this appeal dismissed with costs.

This recommendation of their Lordships is, of course, without prejudice to any application to be made by or on behalf of the

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ward concerning her future position; and considering the present age of the young lady, their Lordships think it would be very proper for the Court to ascertain for itself what her present opinions and wishes are, and what, having regard to those wishes and opinions, would in the present state of things be best for her.

Affirming the principle of the order, their Lordships feel that it would be very difficult for an appellate Tribunal in this country to interfere without injury, as to the details of the particular guardianship and scheme, which must so essentially be a matter of *quasi*-parental discretion to be exercised on the spot by those best acquainted, or best able to acquaint themselves, with all the circumstances, and their Lordships disclaim any desire so to interfere. But they suggest, for the consideration of the Court in India in similar cases, that while selecting a school (such, for example, as Miss Scanlan's in this instance) it would be desirable, where practicable, to have some independent person as guardian, to whom the ward could apply, in whom the Court and the ward could confide, and whose duty it would be to communicate to the Court any matter which might arise.

NOTE.

The interest, well-being, and happiness of the minors ought to be the main and paramount consideration for the Court in selecting the guardian of the person of a minor. Sec. 17 of the Guardian and Wards Act (VIII of 1890) now lays down the different things which ought to be taken into consideration by a Court in appointing such a guardian. As regards the religion of the minor, the leading case points out that from the very necessity of the case, a child under ordinary circumstances, must be presumed to have his father's religion, and it is, therefore, ordinarily, and in the absence of controlling circumstances, the duty of a guardian to train his ward in such religion. So, the fact that the father has changed his religion is of itself no sufficient reason for depriving him of the custody of his child, unless there are other circumstances showing that the welfare of the minor requires that he should not be placed under the custody of his father. (*Mookoond Lal Singh* v. *Nobodip Chunder Singha*, I. L. R., 25 Calc., 881.) The right of a father to direct the religion of his children is so inseparable from his character as parent, that it has been held that an antenuptial promise, made by a father, that the children should be brought up in a particular religion cannot be enforced. (*Agar-Ellis* v. *Lascelles*, 10 Ch. D., 49.)

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v.

SIR HENRY SAMUEL PIERS

[*Reported in 2 H. L. C., 331.*]

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March, 22.

THE LORD CHANCELLOR.—This is an appeal from the decision of the Lord Chancellor of Ireland, upon the adjudication to which he has come, as to the legal validity of the marriage upon which the legitimacy, and therefore the rights of the appellants, depended. It appears that the Lord Chancellor ultimately decided that point on the evidence before him, but he, at the same time, offered an issue, which he thought would try the question of the validity of the marriage. The issue which he offered to the parties was, "whether there had been a special license from the Bishop of Sodor and Man, authorising the clergyman of that island to celebrate the marriage."

Now it does appear to me that the issue so tendered goes very much to explain the ground upon which the Lord Chancellor decided the case, because it shows that, according to the view which he took of it, the question in dispute depended upon the greater or less weight of the evidence upon the one side or the other; otherwise the issue would not reach the question so as to decide upon the validity of the marriage. Such an issue would rest upon the balance of evidence as to a particular fact, upon the result of which the validity of the marriage undoubtedly would depend; but that is not the mode in which the law contemplates matters of proof relating to the lawfulness of a marriage. It entirely lays aside all that strong legal presumption upon which the law proceeds in the case of marriage, and adjudicates upon the point as upon any other matter of fact, with respect to which there is no presumption one way or the other, but where, upon the result of the investigation as to the existence of the fact, the right of the parties might depend.

My Lords, I have not found that the rule of law is anywhere laid down more to my satisfaction than it is by Lord Lyndhurst in the case of *Morris* v. *Davies*,[1] as determined in this House. It is not precisely the same presumption as exists in the present case; but the principle is strictly applicable to the presumption

[1] 5 Cl. & F., 163.

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which we are considering. He says [1]:—"The presumption of law is not lightly to be repelled. It is not to be broken in upon or shaken by a mere balance of probability. The evidence for the purpose of repelling it must be strong, distinct, satisfactory, and conclusive." No doubt, every case must vary as to how far the evidence may be considered as "satisfactory and conclusive"; but he lays down this rule that the presumption must prevail unless it is most satisfactorily repelled by the evidence in the cause appearing conclusive to those who have to decide upon that question.

Now, my Lords, here the legitimacy of the plaintiffs, which is the question in the cause, depends upon the validity of a marriage celebrated in the Isle of Man by a clergyman whose *status* is not a matter in dispute, he having been a regularly ordained clergyman, doing duty in a church there, and as to whose capacity to celebrate marriage there is no dispute. The question arises as to whether the marriage so celebrated was valid according to the law of the Isle of Man, requiring the special license of the Bishop in cases where the marriage is celebrated, as this was, in a private house, and not in a church.

Of the fact of the marriage there is no dispute whatever; there is not even a question raised about that. But not only is the fact of the marriage proved, but it is proved to my entire satisfaction that the clergyman and the parties to the marriage were all anxious that a valid marriage should be celebrated, and all supposed that a valid marriage had been celebrated. It is in evidence that Sir John Piers—the lady whom he married being at that time near the period of her confinement—was anxious to have a child born who might be the heir to his property. There is no doubt that the woman, at all events, must have been anxious for a valid marriage. The clergyman not only must have been anxious not to incur the penalties which the law imposes upon clergymen celebrating marriages otherwise than according to the law of the island, but the evidence shows that he could not possibly have been in that situation, in which he is attempted to be described in the cause, namely, that of a person ignorant of the law, and therefore likely to err, as not knowing what the law of the island was. He not only was a clergyman who had been for a considerable time exercising the functions

[1] 5 Cl. & F., 265.

of a clergyman of one of the churches in the island, but he had been the private or domestic chaplain, as it is called, of the preceding Bishop of Sodor and Man; and he, it appears, had also been previously engaged in celebrating marriages of this description. We therefore have it for certain, that all the parties must have intended that a valid marriage should be celebrated; and that at least one of the parties understood the law relating to the marriage which he was celebrating.

Then we have the subsequent conduct of the parties, proving beyond all question that they supposed that a valid marriage had been celebrated. The children are treated as legitimate children; the wife is treated as the lawful wife; and the conduct of the parties, from beginning to end, shows that they believed a valid marriage to have been solemnized. This is not at all shaken by the fact of a subsequent marriage having taken place in Ireland. We know that that does frequently happen without the slightest imputation on the validity of the first marriage.

Now, under these circumstances, the validity of the marriage is impeached upon this ground, that there is no proof of their having been a special license granted by the Bishop. Then we have a marriage unimpeached by any circumstances to show the knowledge of the parties, or the opinion of the parties, that other than a valid marriage had been celebrated, accompanied by the anxious wish that such marriage should be celebrated—and we have a clergyman engaged in celebrating the marriage, who must be supposed to have been cognizant of the law of the island; he appears to have been so; and, in point of fact, from his position there can be no room for doubt as to whether he was or was not cognizant of the law of the island; and opposed to these circumstances is the absence of proof of the license under which the marriage was celebrated.

Then here is a case which raises all the presumptions the law can raise in favour of a valid marriage. There is nothing to shake it but this: Was there or was there not a special license? Now, that that may be matter to be inquired into, I do not at all deny. It might be possible to disprove, even at this distance of time, some circumstanes upon which the validity of the marriage might depend; but, if disproof was offered, it must be met with all that strength of legal presumption which would operate in favour of the marriage being valid.

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Of what then does the evidence consist?—It consists of the testimony of the Bishop, who can only speak to his not recollecting having granted a special license. He states reasons why he has confidence in his belief that there was no special license. If the opinion which he has given is maintained altogether by those reasons, his conclusion from those reasons is hardly entitled to more weight than the conclusion which your Lordships yourselves may draw. It does not appear that he gives any other reason for coming to that conclusion, except that he has no recollection of having granted a special license, and that, from certain circumstances, he thinks it very improbable that he should have granted it.

Those reasons, when examined, beyond all doubt do not appear to be very satisfactory. Some of the facts upon which he proceeds, if not entirely displaced, are very much shaken by evidence in the cause; as, for instance, that a party wishing to obtain a special license must appear before the Bishop personally, and inform him of the fact. We have very good evidence from Mr. Brown—who held an official situation which must have brought to him a knowledge of the usual practice—from which it is to be inferred that that is not the universal practice. It certainly would be rather an extraordinary practice in matters of that description which are matters very much of course, and are usually transacted by officers authorized for that purpose, and not by the Bishop himself. For instance, Mr. Brown says, that in the year 1818 (it is true that that is after the marriage in question), he received certain directions from the Bishop as to the course to be pursued upon application for a special license. From that, one would infer that the Bishop, in the ordinary course, permitted that part of his duty to be exercised by his lawfully constituted officer, and did not himself personally interfere in the details of all those transactions.

But, however, giving all the weight to the Bishop's testimony which can possibly be asked by those who rely upon the effect of it, it comes to no more than this,—a mere negative,—a mere absence of recollection of a transaction which took place thirty years ago, with certain grounds stated, upon which, either in the whole or in great part, that conclusion, to which the Bishop has come, has rested. I cannot say that that is evidence, in

the language of Lord Lyndhurst, "strong, distinct, satisfactory, and conclusive." It appears to me to be the very contrary of what we understand by the meaning of those words.

But independently of that, there is not only evidence of possibility, but of probability, entirely outweighing the probability of the marriage having been celebrated without a special license, in the fact that the preceding Bishop may have granted such a license. There is nothing whatever at variance with that, except the period which elapsed between the time when the special license is supposed to have been granted, and the time when the marriage was celebrated. But there is evidence that it is not at all an unusual thing for a considerable time to elapse between the one and the other. And we have this in proof, that the marriage was contemplated two years before—the brother of Sir John Piers was intended to be the clergyman to officiate. He was not able, however, to come to the Isle of Man, and the postponement took place on that account. We have therefore the fact of the intention having existed at the period at which, if the license was granted by the preceding Bishop, the license in question would have been so granted. That is not a fact upon which we can rely as conclusive, but it undoubtedly removes a great deal of the alleged improbability of the license having been granted at a period so long antecedent to the time of the marriage.

But, my Lords, I will not go into all the circumstances in detail, simply because the view which I take of this case does not depend upon such an examination of them, but it depends upon this: there is a strong legal presumption in favour of the validity of the marriage, particularly after the great length of time which has elapsed since its celebration, which is not met in this case by that species of positive, distinct, and satisfactory disproof which is essential in order to get rid of the probability of the marriage having been duly celebrated.

Under these circumstances, therefore, I cannot come to the conclusion to which the Lord Chancellor of Ireland has come, either as to the result, namely, dismissing the plaintiff's bill upon the ground that they had not made out their title as legitimate children, or still less as to the form in which he proposed to try the issue upon the validity of this marriage. I really have no difficulty whatever on this part of the case. It

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never appeared to me that there was made out that species of contradiction of the legal presumption, which would justify any Court in coming to a conclusion against the validity of the marriage. The only doubt which I had was as to the course which a Court of Equity ought to have adopted for the purpose of disposing of the question.

Beyond all doubt, my Lords, in an ordinary case in which a question arises as to the legitimacy of children or the validity of a marriage, it would be a case for a Court of Equity to send to trial. But there are peculiar circumstances in this case, which, after some consideration, I am satisfied, make it the duty of this House not to adopt that course. In the first place, it is hardly possible to adopt that course in a mode which would lead to a satisfactory conclusion. It is not a case in which a Court of Equity is bound to do it. It would only do it in the ordinary course of administering its jurisdiction in order to satisfy itself as to the fact upon which the issue would be directed. If the marriage is disproved, there can be no issue directed. Here then the question is, whether the facts are such as, in the discretion of the Court, make it the duty of the Court to direct an issue to be tried by a jury. First of all, it does not depend in any great degree, as we see now from the evidence produced before the Court of Chancery, upon parol testimony; it depends more than anything else upon the effect and validity to be given to the legal presumption. It is not that kind of case which is peculiarly to be investigated before a jury by parol testimony, the aid of which a Court of Equity requires in ascertaining a disputed fact.

But there is another great difficulty. If this issue is to be directed, it will be directed to be tried in Ireland. Now it does so happen, that the evidence upon which the fact is to depend seems to be found anywhere but in Ireland. Part of it, and a most important part on one side of the question, is to be found in this country—that of the Bishop. Now the Bishop of Rochester is residing here, and he has, as it appears, declined to go to Dublin for the purpose of giving his testimony there. But the other part of the evidence, and perhaps next to that of the Bishop, the most important part of the evidence, is to be found in the Isle of Man. So that you would have the jury in Ireland, but you would have no evidence in Ireland;

besides which, if evidence could be obtained, the trial by jury would not in this case be a satisfactory mode of investigating the fact.

Another ground which appears to me to be conclusive as to the course which this House ought to adopt is this: the question depends a good deal upon the effect to be given to the legal presumption, as opposed to the description of evidence which we have here. If a jury should come to the conclusion to which the Lord Chancellor of Ireland has come, namely, that the evidence is sufficient to repel the legal presumption, and that fact should be brought before this House in proper form, could this House be satisfied with such a verdict proceeding upon these grounds? I think it could not, and I believe therefore that an attempt to try the question by an issue would lead to great and unnecessary expense, and that we should by no means come, in all probability, to a more satisfactory result upon the real merits of the case than we may come to on the evidence we have now before us.

My opinion therefore being that the strong legal presumption is not repelled by the evidence in the cause, my advice to your Lordships is to reverse the decree of the Lord Chancellor of Ireland, and to declare that the appellants have established their *status*. That decree upon the finding is quite of course. There will be no reason for sending it back to the Court of Chancery. If there should be anything else to be adjudicated upon, I apprehend that this House will not decide it, but in that case will remit it to the Court of Chancery for the purpose of having that matter disposed of there. As far as I have been able to see into the cause, there is no defence set up against the claim of the appellants, except the question of whether they are legitimate children, and entitled to the property. If that is so, this House will not be departing from its ordinary course in making a decree in favour of the appellants.

Lord Brougham.—My Lords, I am altogether of the same opinion, and for the same reasons I consider the rule of law to have been very clearly laid down in *Morris* v. *Davies*,[1] by my noble and learned friend, Lord Lyndhurst. My noble and learned friend there laid down that rule in very plain terms; and if I had any doubt as to any one of the four descriptions

[1] 5 Cl. & F., 163, 265.

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which he gave of the evidence required to rebut the legal presumption of legitimacy, it is as to the last. I should say, "clear, distinct, and satisfactory evidence." I am not quite prepared to use the word "conclusive." I think some doubt may arise upon that, which it is unnecessary to raise, because if the evidence required be clear and satisfactory, that is quite sufficient for me. I do not like ever to lay down the rule that evidence must be "conclusive," because that gives occasion very frequently to needless and inconvenient doubt.

Have we, then, in this marriage; alleged to have been had 35 years ago in the Isle of Man; always acknowledged to have been intended by the parties for a considerable time before the fact; acknowledged to have been satisfactory to the parties to a certain extent immediately after the fact; recognised by them, and by their acts and deeds at the very time, and subsisting till brought into dispute by two circumstances, the one a matter of fact, namely an unquestioned marriage solemnized in 1821, the other, the proceeding in question to get rid of the charge of 4,000*l.* upon the estate; always acknowledged to have been a sufficient marriage except in those two instances, and until those two periods; have we, I say, sufficiently "strong, distinct, and satisfactory" evidence to repel the legal presumption in accordance with that course of action and acknowledgment?

I say nothing of what took place in 1821, for I am entirely of opinion that that is no argument whatever against the parties believing that they had contracted and solemnized a legal and valid marriage in 1815. It is a constant course with persons who solemnize irregular marriages, which, though irregular, are perfectly valid and perfectly legal, and against which nothing either of presumption or of law can be alleged; it is a constant course for them afterwards, needlessly, superfluously, and, in my opinion, irregularly, to solemnize what is termed a regular marriage, *in facie ecclesiæ*. I say "irregularly," for an obvious reason; because, if the first marriage is valid, the second marriage becomes an irregular marriage. The first marriage was irregular for want of certain ecclesiastical or legal solemnities; but in law it was valid. The second marriage is a mockery; because, for two persons who are single to marry is intelligible, but for two persons who are already married to marry is mockery, and I may almost say a profanation of a very solemn rite of the church. Therefore,

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though I do not consider that that acting of theirs is at all to be commended, yet it is constantly had recourse to. It is a constant course for persons in a certain station of life, who make what is commonly called a runaway or irregular marriage, afterwards to marry *in facie ecclesiæ*, for the purpose of quieting the scruples of persons of nice conscience, but also for the purpose of putting down any public clamour that may have arisen. In England, where the law is so different from the Scotch law, it is a very common thing; for the public here do not know that the Scotch law requires no proclamation of banns, no license, and no consent of parents or guardians, to solemnize a marriage. They do not know these things; and, therefore, they say, "Oh, these people have only been married at Gretna Green, and it is not a valid marriage." In order to meet that public clamour about the fancied illegality and invalidity of the marriage, persons very naturally, but as I said before, very irregularly, and not commendably therefore, in my opinion, marry again in the Established Church. The same parties would be excessively annoyed and very indignant if you were to tell them that the second marriage was necessary, for they would say, "Why, we have cohabited a week before; were we living in concubinage at the time?" They would be excessively angry if you were to tell them that. I have seen the experiment tried in the families of those persons who were the fruits of such a marriage, and they did not at all like it; but, nevertheless, they were the very first people, I have observed, to complain of others as having been married at Gretna Green, and to say, "Oh, yes, but our fathers and mothers were married in certain churches in England." My answer to that always was, "but if the second was a necessary marriage, in what position were your father and mother previously to that solemnization taking place in that church?" And that generally brought the matter to an issue, and put an end to the clamour. However, the existence of those feelings in the public mind upon so very delicate a matter in valuing character, and especially female character, is quite sufficient to account for the marriage in 1821 in this case, and to take away all presumption, which might thence arise, of the parties not believing themselves to have been married in the Isle of Man; not, perhaps, that that of itself would be decisive as the cause of the subsequent marriage, but still it is a strong circumstance.

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It appears to me, therefore, that we may take this to be a marriage not questioned till these proceedings took place, and, therefore, the presumption of law, both as to marriage and legitimacy is, in the words of Lord Lyndhurst, only to be rebutted by "strong and satisfactory evidence." Have we that in this case? —Certainly not. I entirely agree with my noble and learned friend that, from the way in which the issue was tendered, we can quite see what it was which misled the very learned and excellent Judge in the Court below. To send the question of the legitimacy of the marriage to be decided, not upon the whole case, as it ought to be, not upon the whole matter, but to be decided upon one point, to make that one supposed circumstance of fact, the pivot upon which the whole is to turn, is, to my mind, a monstrous error in the Court below,—it is an error which cannot be exceeded, because it is a total confounding of two perfectly different things. It would not be much better than to do this: We say that a parson in a tithe suit has a right to an issue—we say that an heir at law has a right to an issue—we say that—but did anybody ever, in sending an issue upon a tithe suit, which the parson has a right to have against the man setting up a *modus*, did anybody ever, in sending an issue, which the heir at law has a right in like manner to have, think of making it depend upon a particular fact, not upon the whole question, whether a right to tithes is established, or a *modus* is established or not, upon the whole fact of heir or not; but upon some question in the one case, of whether A. B. was churchwarden at the particular time when the terrier was made, or whether a particular fact took place which tended to show that A. B. was heir at law to C. D. or no? No such thing was ever heard—the whole matter is sent to be tried. But it is worse here, because there you have the mere fact in question, and I could much more easily tolerate an order directing an issue, though it would be a most erroneous direction, to try one special circumstance of fact in those two cases that I put, than I could tolerate this issue which has been proposed to be directed here, because this issue is not the thing in question. The thing in question is the validity of the marriage—the thing in question is rebutting or not the presumption of law in favour of the marriage—that is the question; and the issue proposed would have been an issue trying one fact among

many in the case; and this appears to me perfectly erroneous, and a total miscarriage as far as it goes, but a miscarriage fatal to the whole judgment, for it goes to affect the whole.

There is in this case a very peculiar circumstance. No doubt much, if not the whole, depends upon the fact of the license—whether there was a license or not. It is most important to consider who it was that celebrated this marriage—it is a fact which really does dispose of the question in my opinion. It is celebrated by a person in orders, and who had been for some time in orders, in the Isle of Man. It is celebrated by a person who could not by possibility be ignorant of the law of the Isle of Man respecting marriage, because it is celebrated by a person who actually, I think, was chaplain to Dr. Crigan, the predecessor of my Right Reverend friend the present Bishop of Rochester, Dr. Murray, the Bishop in whose time the marriage was celebrated. Here then is a clergyman who had been accustomed to celebrate marriages, who knew from his position, officially, clerically, and generally, the law upon the subject; aye, and who knew another thing,—the high risk that he incurred if he did not celebrate the marriage duly. Is it to be presumed—is it to be really supposed, upon a mere want of memory in the Bishop, for there is a possibility that he might have forgotten, or upon the impossibility of Dr. Crigan, his predecessor, having granted this license, for you must exclude that also—is it upon these possibilities, or either of them, to be presumed that this clergyman should have been so reckless—he who had no kind of interest in running any risk at all? Sir John Piers had an interest, and Lady Piers had an interest in running a risk; but Mr. Stewart had no interest whatever. Mr. Stewart was a man cognizant of the law, who had acted under the law, who had been engaged officially in administering, I may say, the law, as the Bishop's chaplain, and who exposed himself to utter and absolute ruin by celebrating a marriage irregularly. I cannot suppose that likely. It appears to me that that makes a short end of the question. I cannot conceive a man in his position incurring this risk for nothing; and if he did not incur this risk, it was because, in fact, there was a license.

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Then, as my noble and learned friend has most justly observed, the conduct of the parties concurs with the legal presumption, and everything is opposed to that which would tend to rebut that presumption. Two years the marriage had been in contemplation, and it is explained why it did not take place before. That also lets in the possibility of Dr. Crigan having granted a license, which, if you admit every title of the evidence in the cause, is not excluded, because all that Dr. Murray can tell you is, that he does not remember granting the license. Suppose Dr. Murray, instead of saying (for that is all his evidence amounts to), "I do not think I did—I do not recollect that I did," had actually, stringently and conclusively sworn, "I never did; I know I never did; for I have reason to know I never did; I am as certain I never did as I am certain I never committed felony, or my own self married irregularly without a license, and thereby committed a great offence." Suppose he had said that, which he has not said, he cannot tell what Dr. Crigan did; he cannot tell what happened before his time; he does not pretend to say so. Then am I to shut out all possibility of this having taken place before, when all that is to be urged against it is delay? But Sir John Piers might have let the license lie over for a particular reason; and, accordingly, a particular reason is actually afforded here with respect to the expectation of his brother coming over to celebrate the marriage.

Then they act accordingly; they intended to marry. Had they a reason to intend to marry? Most undeniably. There was a very considerable fortune and a Baronetcy depending upon it. Sir John Piers wished to have a legitimate son, and the lady was in that state which made it most likely that he should then wish the marriage to take place, because she was within some three or four weeks of her actual confinement. It might be done, therefore, to take the chance of a legitimate son and heir being produced by that lady to whom he was attached. Then they intended to marry. What did they do? They performed what they believed to be a valid ceremony of marriage; and on the very day of the marriage, Sir John Piers executed a settlement in which he calls the lady his wife.

Upon the whole, therefore, I entertain no doubt whatever in this case, that upon the merits there has been a miscarriage below. The only question,—and I was of the same opinion as my noble and learned friend the last time the cause was before your Lordships,—the only question which we had to consider was whether we ought not to direct an issue, as, generally speaking, this is the sort of matter which is sent to be tried by an issue. I should most deeply have lamented if it had been found necessary to send an issue, for this one reason among the rest that, as my noble and learned friend says, in the circumstances of this case, suppose the jury had come to the conclusion that there was no evidence of the license, or that it was disproved; and led away by that or any other circumstance, or by the play at Nisi Prius, which one, who has lived so long in that atmosphere as some of us have done, knows to be practised, and knows too that though it may be very expedient for successfully reaching the truth, is not always without the result of misleading the jury, the truth failing to be elicited. Supposing that from any such accident the jury had come to a conclusion contrary to what I verily believe the fact to have been, I am quite sure I should not have been satisfied by it, and the verdict would not have bound me. If it had gone back to the Court below, it would not have bound the Court. The Court is not bound by the verdict; it may send it to another trial, but if the Court had been satisfied with that verdict, it would have come here again, and I should have been just in the same position in which I am now—that is, always upon the supposition that a different kind of evidence would have been producible before the jury than has been forthcoming before the Court, and is forthcoming and is produced before us. But would there have been any such further evidence? I am putting it very strongly in supposing that there might have been such evidence, the possibility of obtaining which very often tempts us, contrary to our wishes, to send cases to be tried where there is the possibility of the jury seeing and examining the witnesses when giving their evidence *viva voce*, a possibility which we have not in equity. But would that have been the case? I am putting it as supposing it had been; but even then it would not have been conclusive. We are not bound, either by law or in fact, by the certificate of a

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Court. But here you could not have that parol evidence, nor anything of the kind; for, as my noble and learned friend has well observed, Ireland must be the place where the issue would have been tried. The witnesses are either in this House, the Bishop, or in the Isle of Man, and some of them dead. Then you would have, what? You would have a commission here to examine the Bishop. But you have got his examination already. The Bishop would not give other evidence under any commission than what he has given under the last commission. The other evidence in the Isle of Man you would have, but it would be just the same as you have here. Then where should we be with an issue? We should stand precisely in the same position in which we stand at this very moment; we should have the very same evidence, together with, what I should call, the useless verdict of a jury. Therefore, I most heartily rejoice, and for these reasons, that we do not find it necessary to send it to a jury.

No doubt if there is any thing to be done further, the case ought to go back, but I see nothing here except the charge upon the estate, and the validity of that charge of 4000*l.* depends upon the fact whether A. B. and C. D., in whose favour the power is to be executed, or the charge to be raised, are lawful children or not. If that is the whole question, I do not see, any more than does my noble and learned friend, any reason for sending it back. I therefore entirely agree with my noble and learned friend, that this case has been misdecided below, and that the judgment below ought to be reversed.

Lord Campbell.—My Lords, it seems to me that this case depends entirely upon the effect to be given to the presumption of law in favour of the marriage. It is allowed that there is a presumption in its favour, and, until the contrary is proved, we are bound to draw the inference that everything existed which was necessary to constitute a valid marriage, and among other things, that there was a special license from the Bishop of Sodor and Man. But it is likewise admitted on the other hand, but this is not a *præsumptio juris*, that it may be rebutted, and that it can only stand subject to the contrary being proved. The whole question, therefore, depends upon what sort of evidence is required to prove the negative, and to give effect to it. It seems to me, my Lords, as

if the very learned Lord Chancellor of Ireland had been of opinion, that the only effect of the presumption is to shift the burden of proof; and that instead of the party who stands upon the validity of the marriage being obliged to show that there was a license, it lies upon the other side to impeach the validity of the marriage, and prove that there was no license, but that the *onus* being shifted, then it is a question to be treated as any other fact between indifferent parties, and that the conclusion to be pronounced is one which depends merely upon the balance of testimony. It is quite clear, in my opinion, that this was the view taken of it by the Lord Chancellor of Ireland, from the issue which he proposed to direct; for if that issue had been tried, it is quite clear the jurors could merely have been directed to consider whether in their private belief there had been a marriage or not.

But it seems to me that that is entirely contrary to the well-established principles of law which have been long laid down and acted upon for the security of marriage. Indeed, Mr. Parker, as might be expected from a gentleman of his great legal discrimination and high professional eminence, allowed at the bar, as he was bound to do, that that was not the mode in which the validity of the marriage was to be tried; and he said, you must show a high degree of probability that there was not a license. That comes pretty much within the definition of the mode in which the presumption is to be rebutted, which has been cited by my noble and learned friend on the woolsack, from Lord Lyndhurst, and which has been acquiesced in by my noble and learned friend who last addressed your Lordships, with some slight modification.

My Lords, my opinion is, that a presumption of this sort, in favour of a marriage, can only be negatived by disproving every reasonable possibility. I do not mean to say that you must show the impossibility of any supposition which can be suggested to support the validity of the marriage; but you must show that this is most highly improbable, and that it is not reasonably possible. Because, otherwise there is a tremendous responsibility cast upon you with regard to the *status* of the woman and of the children. See the peril which you are encountering; because you may be deciding that a woman is a concubine, and that the children are bastards, upon a mere

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speculation, when in fact, contrary evidence may afterwards be produced, when it is too late, to show that there was that in existence which would render the marriage valid, the woman the wife of the person to whom she was married, and the children legitimate. My Lords, to avoid such a peril, the law requires that you should negative every reasonable possibility. Here, there are two possibilities which are suggested: first, that there was a license granted by Dr. Crigan, the former Bishop of Sodor and Man; and, secondly, that there was a license granted by Dr. Murray, who was the Bishop of Sodor and Man at the time when the marriage was solemnized.

In the first place, I must draw your Lordships' attention to the presumption of law which requires a Judge not to exercise his own private notion, or to indulge in his own private opinions upon the subject, but to believe that every thing was solemnly and effectively done. That is greatly strengthened here by the facts of the case; because that there was a marriage *de facto* is not denied. The parties were exceedingly anxious that there should be a marriage. The clergyman not only had the means of knowing the law of the island, but there is every reason to believe that he did know the law of the island; there is every reason to believe that he was aware that if he solemnized a marriage contrary to the law, he was liable to severe penalties, and amongst others, to have his ears nailed to the pillory. It is quite clear that the parties believed that they had celebrated a valid marriage; for on the very day on which the marriage was celebrated, Sir John Piers executed a deed, whereby he charged the estate, according to his power, with certain uses, and in that deed he calls the lady his lawful wife.

How then is this presumption, so strengthened, rebutted? simply by the evidence of Dr. Murray, the late Bishop of Sodor and Man, now Bishop of Rochester. I look upon his evidence to be most candidly given; that he is as sincere as it is possible for a man to be; and that his mind is wholly unbiassed. But what does even his evidence amount to? Merely to this; that there was a conviction—no doubt a firm conviction—upon his mind that he had not granted a license, but only for the reasons which he assigns. Now the principal reason was, that he surely could not have granted the license, because Sir John Piers and the lady

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were living in concubinage. That might certainly be a strong reason against granting the license, but possibly also it might be a reason for granting it; because, if a letter had been written, or if a memorial had been sent to the Bishop, by Sir John Piers, stating that he had unfortunately been living with a lady as his mistress, that her condition was known in the island, that he was desirous of making her his lawful wife, and at the same time avoiding the publicity of the ceremony, and that he would have the marriage celebrated if he could procure a license and do it privately, it is possible that, for the purpose of rendering the connection between this man and woman a lawful one, the Bishop might have granted the license, he might or he might not, but whether it was so or not, it is impossible for us, at this distance of time, to ascertain.

But there is another supposition: The Lord Chancellor, when listening to the arguments at the bar of this House, and when his mind is addressed, as it always is, to what falls from the learned gentlemen at the bar, may be signing thirty or forty documents. Supposing you were called upon to negative the fact that he had signed a particular document, which, there was no doubt, bore his genuine signature, if that document should not be forthcoming, would you negative the existence of it by Lord Cottenham being called and saying, "I have no recollection whatever of having signed that instrument?" Notwithstanding all our high respect for him, should we be necessarily bound to believe that his opinion of what he had done or had not done was right, by some reason which he assigned for it, particularly if that reason should not be altogether satisfactory? Is it at all in a high degree improbable taking Mr. Parker's test, that the secretary laid that instrument before him, that the Bishop signed it, and that, at a distance of thirty years, he has forgotten that he did so?

Your Lordships will also bear in mind, that I am not bound privately to believe either one speculation or the other. The question is, are they all satisfactorily negatived? I am not bound to believe that Dr. Crigan granted the license; but it is possible that he may have done so, and that possibility is enough for me to act upon, if it is not satisfactorily negatived. Where is the high improbability that he may have granted the license? In the first place, the license might have been granted, and Sir John Piers might have done, as I have known others do, who were living in

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concubinage, wait until the woman became pregnant, and he was likely to have issue by her, and then make her his lawful wife before the birth of the child. It appears in this case, that they had been waiting for some time, till another clergyman, a brother, should perform the ceremony. I am not bound to say that that certainly took place, or that it probably took place; it may have taken place, there is no reasonable impossibility of its having taken place, and that is a supposition, to negative which not a tittle of evidence is brought before your Lordships.

It appears to me therefore, my Lords, that the presumption of law which exists in this case, and which is strengthened by the facts, is not at all met by contrary evidence, and that therefore we are bound to believe that the license existed.

As to the second point, upon which the Lord Chancellor of Ireland did not lay much stress, but upon which some stress has been laid at the bar. I must observe, according to what has been said by my noble and learned friend, who last addressed the House, that it is entitled to no weight whatever. I think during the argument it was mentioned that the Archbishop of Canterbury and the Lord Privy Seal had both been married in Scotland, and had afterwards been married in England. My Lords, I have by me an instance in the case of a Lord Chancellor. This is what was done by a great lawyer, who, even at the time of his marriage, was eminent in his profession. No doubt was entertained about the marriage celebrated at Galashiel's being sufficient both at law and in equity. He had been married in Scotland by an Episcopalian clergyman, not by the blacksmith. He was married by a regularly ordained clergyman of the Church of England, according to the rites and ceremonies of the Church of England. With a view to the easy evidence of the marriage in future times, it was thought right to have the parties married in England, in conformity with the provisions of Lord Hardwicke's Act. Accordingly the ceremony was again performed in the parish church of St. Nicholas, Newcastle, in the presence of the father of the bride, and the brother of the bridegroom, and the following entry was made of it in the register. [His Lordship read it.[1]]

[1] The following is extracted from the parish register of Saint Nicholas, Newcastle: "John Scott and Elizabeth Surtees, a minor, with the consent of her father, Aubone Surtees, Esq., and both of this parish, were married in the church by license, the 19th day of January, 1773. by me.

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Now here she is described as a single woman, and only by her maiden name. In the present case there is an allusion made to the name which the woman acquired by marriage. In Lord Eldon's case it was the same. Therefore, according to that distinguished precedent, the second marriage, which, in the case before your Lordships was afterwards celebrated in Ireland, does not, in the slightest degree, impugn the fact that there had been a valid marriage in the Isle of Man.

Then we come to the question as to whether there ought to be an issue or not. I should deeply have deplored if there had been any rule guiding Courts of Equity, which required that there should be an issue. I am happy to find that there is none such. Then, as it does not come within the cases where there is such a rule, if there was such, with all respect we should be governed by it; but, there being no such rule, we have to consider whether it will further the ends of justice that such an issue should be directed.

My Lords, where there is no such rule for the guidance of a Judge, I apprehend that he is to consider whether upon the matter submitted to him he thinks a jury will try that question better than he can himself try it. If he has no doubt, or if he thinks he can, under the peculiar circumstances of the case, come to a safer conclusion than a jury would do, it is his duty to decide himself, without granting an issue. My Lords, I cannot know what a jury would do; but I should say that any Judge who should try this cause, and who knew how the cause ought to be tried, upon such evidence as we have here, would direct the jury to find a verdict in favour of the validity of the marriage.

Then, my Lords, it is not suggested that there is to be any parol evidence taken—we have the whole case before us. Moreover, this is not a case depending upon the credit of a particular witness, where it is suggested that he has perjured himself, or that there is a conspiracy to deceive the Court, and to pervert the ends of justice. It might be proper in

This marriage was solemnized between us,
John Scott,
Elizabeth Surtees
In the presence of us,
Aubone Surtees. Henry Scott."

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such a case to submit the facts to a jury, before whom the witnesses may be examined, and cross-examined, that they may see their demeanour, and judge whether they are to be believed or not. I give implicit credit to every syllable that the Bishop has said. Then why should there be an issue? I must say, my Lords, with respect to cases which are fit to be tried by a jury, no one has more respect than I have for the decision of a jury; but cases of this sort can just as well be tried by a single Judge sitting in Equity, or by your Lordships sitting here as a Court of Appeal. I do not see why twelve gentlemen, wholly unacquainted with the rules of evidence and of law, should try it better. Therefore I rejoice to think that there is no such rule which compels us to grant an issue in this case; and there being no rule, I have no hesitation in saying that I believe there ought not to be an issue granted, but that we ought to follow the course suggested by my noble and learned friend.

Mr. Bethell applied for the costs of this appeal, and referred to *Stokes* v. *Heron*,[1] as laying down the rule that the costs of an appeal in a case where there had been a great miscarriage in the construction of a will, should be paid out of the estate. He submitted that that principle ought to be extended to the present case.

The Lord Chancellor.—The cases differ from each other. There the expense of the appeal was occasioned by the wrong construction of a will, which was purely an act of the Court. Here the question was one of fact, which it might have been necessary to carry to a Court of Law.

Mr. Bethell then called the attention of the House to the fact, that two Appendixes, containing the same evidence and documents, had been printed in this case, and an expense wholly unnecessary had therefore been incurred.

Lord Brougham.—There ought never to be two Appendixes. That is an abuse never practised in the Admiralty Courts, and which, though it once existed at the Privy Council, is now discontinued there. The same course ought to be followed here. The parties ought always to print a joint Appendix.[2]

[1] 12 Cl. & F., 203.

[2] The practice had probably been adopted upon a construction of the following Standing Order. No. 119, formerly No. 194, 8th December, 1813.—"Ordered, That in all cases of appeals and writs of error, which were depending in this House, and the printed cases in which were delivered on or before

THE LORD CHANCELLOR.—I perfectly agree with my noble and learned friend on that point.

Decree reversed, and a new decree made, declaring the appellants the lawful children of Sir J. B. Piers, and the sums claimed to be charges on the lands comprised in the settlement, and remitting the cause to the Court of Chancery in Ireland, to give effect to this decree. Journals, 22 March, 1849.

the 24th day of February, 1813, the party or parties do respectively print an Appendix to the said cases delivered, and do therein set forth so much of the proofs taken in the Courts below as they intend to rely on respectively on the hearing of the said causes, and which is not already set forth in the printed cases by them so respectively delivered; and that such Appendix do contain a reference to the documents where the same may be found, etc.—2 H. L. C., 387.

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[*Reported in L. R., 8 Ch., 622.*]

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Thomas Andrews, the father of the plaintiff, was a chemist and druggist, and was a Roman Catholic. His wife Ellen was the daughter of Joseph and Mary Fleetcroft, who lived at Chester, and she and her family were members of the Church of England. After the death of Thomas Andrews she married Mr. Kelsey, a butcher, her present husband. Mrs. Kelsey swore that, on the day when she was engaged to be married to Thomas Andrews, she, in the presence of her mother, had a conversation with him respecting the difference of religion between them; that she said to him: "If there is any family, it may make unpleasantness between us unless there is some arrangement made"; and that he replied that he was quite willing that the girls should be brought up as Protestants and the boys as Catholics, and that she and her mother consented to this. Her mother, Mrs. Fleetcroft, confirmed her evidence, and the Lords Justices considered it proved that Thomas Andrews did promise his intended wife before their marriage that he would allow any girls they might have to be educated as Protestants. On the other hand, the appellant and the other members of the Andrews family positively swore that they never heard of any such arrangement, and, though Mrs. Kelsey stated that she had had conversations with members of her husband's family on the subject, she could not remember when or with whom those conversations occurred, and the Lords Justices therefore were not satisfied that the arrangement that boys should be brought up as Catholics and girls as Protestants was ever communicated by Thomas Andrews to his own family.

Thomas Andrews and his wife were married in the Cathedral of Chester by a clergyman of the Church of England, on the 7th of March, 1854. A boy Francis Xavier Joseph Andrews, was afterwards born, and had always been brought up as a Catholic. In the early part of the year 1862 Thomas Andrews became seriously ill of consumption, and went to reside with his own mother at Liverpool. His boy was also taken care of by his own relations. His wife went to reside with her father and

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mother at Chester, where, on the 22nd of May, 1862, the plaintiff was born. She was baptized at Christ Church in the City of Chester, by a clergyman of the Church of England. There was a conflict of evidence how far Thomas Andrews approved or disapproved the child being baptized as a Protestant. Mrs. Kelsey swore that she wrote a letter to inform him that she was going to have the child baptized, and mentioning the names of the sponsors, who were known to him to be Protestants, and that she got an answer, not stating any objections to the child being baptized as a Protestant, but saying that a Catholic priest would call upon her, but no priest called. The witnesses on the other side stated that Thomas Andrews spoke to them about getting a priest to baptize the child, but that there was a difficulty, because a priest would not go to a house to baptize a child unless it was ill. Some time afterwards, namely, about two months after the baptism of the child, the mother went from Chester with the child to visit the father at Liverpool. There was some doubt as to what took place between the father and the mother about the baptism of the child when they met. The witnesses for the appellant represented that a Catholic priest had been sent for to baptize the child; that he did not do so because it was discovered that the child had been baptized already; and that the father was very much surprised and annoyed that the child had been baptized. On the other hand, Mrs. Kelsey denied that there was any unpleasantness whatever between her and her husband on the subject of the child being baptized a Protestant.

Upon this conflict of evidence, the Lords Justices considered it probable that Thomas Andrews, who at this time was very ill of consumption, may have been really desirous that the child should, if possible, be baptized as a Catholic and may have told his relations so, but that, at the same time, remembering the promise he had made to his wife that she should be allowed to bring up her daughters as Protestants, he did not dare openly to express his feelings to her, or to take any active steps to prevent the child being baptized a Protestant.

* * * * *

On the 14th of February, 1863, Thomas Andrews executed the following will:—

"I, Thomas Andrews, of Manchester, in the county of Lancaster, chymist and druggist, hereby direct that my children

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shall be baptized and brought up as members of the Roman Catholic Church, and, in the event of my death, I hereby appoint my brother Joseph Andrews, of Manchester, reporter, the guardian of my children for the execution of this my request, giving him power, should he see fit, to appoint any other person being a Roman Catholic as guardian to my children to act in case of his death, or upon his ceasing voluntarily to discharge the duty, and to adopt any course which he may think proper for carrying out my intentions."

* * * * *

May 6. Sir G. Mellish, L. J., delivered the judgment of the Court as follows :—

This is an appeal by the defendant, Joseph Francis Andrews, from an order of Vice-Chancellor Malins, whereby he ordered that the defendant, Joseph Andrews, should be restrained until further order from interfering with the custody or education of the plaintiff, and that a proper person or persons be appointed to act as guardian or guardians of the said infant during her minority or until further order, and to settle a scheme for her maintenance, education, and bringing up, and that the costs of the motion be costs in the cause. The practical question to be decided is, whether the infant plaintiff, Mary Ellen Andrews, a girl now nearly eleven years old, ought to be removed from the custody of her grandmother, Mrs. Fleetcroft, where she is being educated as a member of the Church of England, to the custody of the testamentary guardian appointed by her father, to be educated as a Roman Catholic. The only evidence before the Vice-Chancellor was a single affidavit filed in support of the motion, but before us the witnesses on both sides were examined *viva voce*, and we also had an interview with the plaintiff herself; and it is necessary we should state the conclusions we have come to on several disputed questions of fact which were raised before us. We may state that although there were several contradictions between the evidence given by the witnesses on each side, we think they may be accounted for by forgetfulness and by the natural bias of the witnesses in favour of their own side, and that we do not suspect any of the witnesses of intending wilfully to deceive us. [His Lordship then stated the effect of the evidence as given above, and continued :—]

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We have not thought it necessary to state the letters of the parties at length, but they very plainly prove that, while the appellant and his family were from religious motives conscientiously desirous that the plaintiff should be educated as a Catholic, the Fleetcrofts, on the other hand, were principally influenced by a strong affection for the plaintiff herself, and by what they believed would be for her happiness, and were comparatively indifferent to the religious question. Subsequently to February, 1872, the case has been in the hands of the lawyers. The Court of Queen's Bench have held at law that they are bound to order the plaintiff to be given up to the appellant as the testamentary guardian appointed by the father, if the will is duly proved. In consequence of this decision this bill has been filed, and the Vice-Chancellor has held that there are sufficient reasons to induce this Court to restrain the appellant from enforcing his legal right to the custody of the plaintiff, and we have to say whether we agree with this decision.

The first question we shall consider is, what is the legal effect of an agreement made before marriage between a husband and wife of different religious persuasions that boys should be educated in the religion of the father, and girls in the religion of the mother? We are of opinion that such an agreement is not binding as a legal contract. No damages can be recovered for a breach of it in a Court of law, and it cannot be enforced by a suit for specific performance in equity. We think that a father cannot bind himself conclusively by contract to exercise, in all events, in a particular way, rights which the law gives him for the benefit of his children, and not for his own. We entirely agree with the decision of the Lord Chancellor of Ireland, [*In re Meades*[1]], in which he held that the Court could not during the lifetime of a father compel him out of his own funds to educate a child in a different religion from his own. So, also, if after a father's death it appeared to the Court that it was most for the benefit of a child to be educated in the religion of his father, we think that the Court would not abstain from ordering him to be so educated because the father had agreed with the mother that the child should be educated in her religion. On the other hand, if, after the death of the father, circumstances happen which, in the opinion of the Court, make

[1] Ir. L. R., 5 Eq., 98.

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it for the benefit of a child to be educated in the religion of the mother, and the question arises whether the father had so acted that he ought to be held in this Court to have waived or abandoned his right to have his child educated in his own religion, the fact that the father before marriage promised the mother that girls, the issue of the marriage, should be educated in her religion, is a circumstance to which in our opinion weight, and perhaps great weight, ought to be attached. This appears to have been the opinion of Lord Hatherley, from what he said on the subject in *Hill* v. *Hill*,[1] though in that case he did not think that the fact of the agreement having been made was satisfactorily proved.

We will next consider whether it is made out that it will be for the interest of the plaintiff to be educated in the religion of the Church of England, and as we are of opinion from our interview with the plaintiff that she has not acquired the distinctive principles of the Church of England to such an extent as to make it wrong and cruel on that account that she should be educated in the Roman Catholic religion, the advantage of her being educated in the religion of the Church of England seems to depend on its being made out that it is for the advantage of the plaintiff to remain with the Fleetcrofts, and that she cannot remain with them if she is to be brought up as a Roman Catholic. Is it, then, for the advantage of the plaintiff to remain with the Fleetcrofts? Let us consider how the case would be if there were no religious question raised, and the parties were all of the same religious persuasion. A man having a wife and an infant boy and girl is prevented by consumption from earning a livelihood for them. He and the boy are supported by his relations—his wife and the girl by the wife's relations. He dies in that condition; the boy continues to be with and to be supported by the father's relations, and the girl to live with and to be supported by the mother's relations, until she is nearly nine years old. The mother's relations have acquired a strong affection for the girl, and the girl for them. Would the Court allow a guardian appointed by the father, but who up to that time had made no use of his power, had not even given notice to the mother's relations of his appointment as guardian, to exercise his legal right to remove the girl from

[1] 10 W. R., 400.

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the custody of those by whom she was being brought up? We are of opinion that the Court of Chancery would at once, under the circumstances supposed, restrain the guardian from exercising his legal powers. The girl must be educated by charity, and it is manifestly better and for her advantage that she should be intrusted to the charity of those whose kindness she has already experienced. If, therefore, there were no religious question, it is plain to us that the plaintiff ought to be left with the Fleetcrofts.

Then, what difference does it make that there is a religious question; that the object of the testamentary guardian in removing the plaintiff from the custody of the Fleetcrofts is that he may obey the injunctions of the father that the plaintiff should be educated as a Catholic? Many persons would be disposed to say that it ought to make no difference whatever, except to afford an additional reason for not changing the custody of the child. We cannot go that length. The law unquestionably does give great weight to the right of a father to have his children educated in his own religion both during his lifetime and after his death; and if a father has done nothing to forfeit or abandon his right to have his child educated in his own religion, we think that the Court cannot refuse to order a child to be educated in the religion of its father because it thinks that the child would be more happy and contented, and possibly be better provided for by its mother's relations. On this ground, in *Hawksworth* v. *Hawksworth*,[1] we affirmed an order made by Vice-Chancellor Wickens, which ordered a girl of eight years old, notwithstanding that her mother was a Protestant, to be educated in the religion of her father, a Catholic. It is clear, however, that a father may, by his conduct, lose his right even in his own lifetime, and much more after his death: and after giving the case the best consideration in our power, we have come to the conclusion that Thomas Andrews and the present appellant have by their conduct lost the right of requiring the plaintiff to be removed from the custody of the Fleetcrofts for the purpose of being educated as a Roman Catholic. Not only did Thomas Andrews promise his wife that any girls they might have should be educated as Protestants, but practically

[1] L. R. 6 Ch., 539.

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that promise was carried out without objection or serious opposition until the plaintiff was nearly nine years old. No doubt it is alleged by the appellant and his family that this was done against the will both of Thomas Andrews in his lifetime and of the appellant since his death, but we cannot help thinking, nevertheless, that it was the natural result of the conduct of Thomas Andrews. If Thomas Andrews had really never promised his wife that their girls should be educated as Protestants, and was really an earnest Catholic as alleged, he would have told his wife in plain terms when a girl was born that he wished the child to be baptized as a Catholic, and if she caused her to be baptized as a Protestant contrary to his wishes, surely he would have reproached her with having disobeyed his orders, and would have told her that he intended the child to be educated as a Catholic, and would not have concealed the making of his will from her. He did not do any of these things, and we are convinced he did not do them because he felt himself bound as between himself and his wife by the promise he had made her, and did not dare to tell her that he intended to break it. With respect to the appellant, we do not wish to make any remarks against him. We think he acted with great liberality, having a wife and children of his own, in supporting his brother's boy, and that he could not have been expected to support the girl also. But still the result of his conduct and that of Thomas Andrews has been that the plaintiff has been brought up by the Fleetcrofts as a Protestant, and cannot now be removed from their custody without prejudice to her happiness, her prospects in life, and possibly her health.

We are of opinion that the decision of Lord Eldon in *Lyons* v. *Blenkin* [1] and of Lord Hatherley in *Hill* v. *Hill* [2] are authorities on which we ought to act in the present case. *Lyons* v. *Blenkin* [1] proves that even a father himself may lose the right to the custody of his child by allowing it to be brought up by other persons if it becomes the manifest interest of the child not to be removed from the custody in which it has been placed, and Lord Eldon thus explains the principle [3] :—

[1] Jac., 245. [2] 10 W. R., 400.

[3] Jac., 255.

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"The view I have taken of the case is of this sort. Here is a fund provided for the maintenance and education of these children, and I think I am properly warranted by authorities in asserting that if a testator thinks fit to provide a fund for the maintenance and education of children during their minorities, and at the end of that period makes a further provision for them, and the father permits their maintenance to be supplied from that source, allowing them to be brought up with expectations founded upon a particular species of maintenance and education, which he himself cannot afford to give them, he is not (unless I greatly mistake the matter), according to the principles of this Court, at liberty to say that he will take them from the course of education which they have hitherto pursued, and that, too, at a period approaching to maturity of age. He is not at liberty to say, I will alter the course of education of my children by applying more scanty means to the purpose, and I will not permit them to have the benefit of that sort of maintenance and education which they have hitherto had, and in consequence of which their views in life are very different from what they would have been without it. With the religious tenets of either party I have nothing to do, except so far as the law of the country calls on me to look on some religious opinions as dangerous to society."

And afterwards he said[1] :—

"It is always a delicate thing for the Court to interfere against the parental authority, yet we know that the Court will do it in cases where the parent is capriciously interfering in what is clearly for their benefit. In the case of *Powel* v. *Cleaver*[2] the principles on which this Court proceeds were fully discussed. In a case of this kind the Court would not feel itself at liberty to deliver back the infants to the custody of their father, and for the reasons that I shall notice. It has been stated that he is a dissenting minister. I mention that again, guarding myself against its being supposed that his bearing that character furnishes the least ground why he should not have the care of his children; but it furnishes this observation—that his situation in life leaves him without the means of so educating them as they ought to be educated, regard being had to their fortune

[1] Jac., 262.

[2] 2 Bro. C. C., 499.

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and estate. The father objected to the aunt because she married; she objected to delivering over the children to their father because their mother died and the father had taken another wife; but the circumstance that decides me about not removing the children is this—that although the testatrix could not impose the terms of appointing a guardian where the father was living, yet the father, by his consent, might enable the guardian to act; and by his consent it appears that he has enabled the guardian to act, and by such consent these children have, with very little interruption, continued under the care and guardianship of the aunt. All their habits have been acquired under the roof of their aunt; all their connections have been formed under their aunt; and it appears to me that the father has so far given his consent to this course of education as to preclude him from saying that he shall now be permitted to break in and introduce a new system of education which cannot be consistent with the system to which they have been habituated, and where so much depends upon the *quantum* of supply for the purpose which the discretion of this lady may lead her to apply, if the testatrix has left her the discretion of regulating the means for their education."

The facts of the case of *Hill* v. *Hill*[1] more nearly resemble those of the present, though there are no doubt differences between them. They agree in this—that in both cases the unfortunate situation in which the child became ultimately placed was the result of the vacillating opinions and vacillating conduct of the father, caused by the conflict in his mind between his desire to fulfil his promise to his wife and his religious principles. We are also influenced by the strong opinion expressed by the Judges of the Court of Queen's Bench, that, if they had the authority and could have exercised the same discretion which the Court of Chancery has, they would not have ordered the plaintiff to be given up to the appellant.

The only question which remains to be considered is whether, although it may be advisable that the plaintiff should remain with the Fleetcrofts, she may not remain with them and still be educated under the directions of the appellant as a Catholic. We are, however, clearly of opinion that, although it appears to have been at one time contemplated that the plaintiff should

[1] 10 W. R., 400.

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be a day scholar at a convent school at Chester and still live with the Fleetcrofts, this would for obvious reasons be a most injudicious and improper mode of education. If she is to remain with the Fleetcrofts, it seems to us obvious that she must be brought up as a Protestant. On the whole, we are of opinion that the order of the Vice-Chancellor ought to be affirmed, but under all the circumstances of the case, believing, as we do, that the appellant has acted from conscientious motives, and thinking that he was justified in taking the opinion of the Court of Appeal, we are of opinion that the order should be affirmed without costs.

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v.

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[*Reported, 10 Vesey, 52.*]

1804.
July, 28.

The judgment of the Court was delivered by

THE LORD CHANCELLOR.—In this petition one of the parties is a natural-born subject of this country, possessed of very considerable property, and having a considerable increase in expectation. The other is an alien; but an alien friend; living under the protection of this country. Great jealousy appears in the settlement, from the condition imposed upon the defendant to co-habit with his wife, and his covenant not to compel her to follow him, if he chose to go to France. They seem to have forgot the children in that particular; and it is strange, that they should have forgot that; as the question might have, arisen from their differing upon the point of residence, which has arisen under different circumstances, who should have the satisfaction of having the care of the child. The Court of King's Bench, when the child was brought up by *Habeas Corpus*, declined to interfere; and I am not surprised at it; for that Court has not within it by its constitution any of that species of delegated authority, that exists in the King, as *Parens Patriæ*; and resides in this Court, as representing His Majesty. That application therefore failed, and the child was left in the custody of the father.

It has been truly observed, that, the petition being presented upon the part of an infant, the Court will do what is for the benefit of the infant, without regard to the prayer. I do not mean to decide, whether I am at liberty to pay attention to the affidavit of the wife. I do not go into the detail of conduct on either side; as I am to attend to the dispute no farther than as it is material to the prayer, that the defendant may be restrained from taking his wife out of the jurisdiction; and as it regards the interests of the infant. But I am much struck with the case, as it has been represented: on the one hand, a mother and wife struggling to compel a lasting separation: on the other hand, a husband, endeavouring by what is

called cruelty and ill-usage, which undoubtedly may be most aggravated, though no blow is struck, to possess himself through the wife's act of the property, which the parties to this settlement have been extremely careful to withdraw from his reach. The Court is under great difficulty, considering, whether the conduct of either husband or wife is such as will justify actual separation ; which exists in proof before the Court ; for the contract is indissoluble in a stricter sense than has been stated. It can be dissolved only by Act of the Legislature ; with the exception of a separation *a vinculo matrimonii* by the Ecclesiastical Court for certain causes : but there is no jurisdiction for separation *a vinculo matrimonii* for such causes as these ; and I cannot judge, whether the circumstances in proof would be sufficient to justify a sentence of separation *a mensa et thoro* by the Ecclesiastical Court. I have no authority to deliver to the defendant the person of his wife ; but he may institute a suit for restoration of conjugal rights ; and, if there has been ill-usage, that will justify her retiring from his residence. Her remedy is, not in this *forum*, but in the Ecclesiastical Court, to which she may resort for that separation, which those Courts alone are by the law and policy of this country entrusted to establish. I must consider the wife at present as living under circumstances, under which the law will not permit her to live. A very material consideration then arises, whether the child is to be removed to the custody of the mother, not living with the father, according to the obligation of the marriage contract, which I am bound to consider subsisting, until I am told by better authority than affidavits that it ought no longer to subsist. This is an application by a married woman, living in a state of actual, unauthorized, separation, to continue, as far as the removal of the child will have an influence to continue, that separation, which I must say is not permitted by law.

With these views I have looked at the conduct of the husband and wife, so far as regards themselves ; for, however relevant, if he had sued out a writ of *Habeas Corpus* to the Court of King's Bench, to have his wife restored to him, or in the Ecclesiastical Court upon a suit by either of them, these circumstances have no relevancy here, except with reference to the consideration, how far it is fit, that the infant should be left in the possession of the parents, or either of them, under such

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circumstances. Any relief as to the wife arises only out of the covenant. But there is no jurisdiction here to relieve her from ill-usage. As to the political and religious principles of this gentleman, there is but an unsatisfactory account upon those topics by the affidavits; if my consideratio[n] ought to be called to them. But the view, that I take of those affidavits, is, as they create more or less probability, that he may be removed from this country; and, therefore, that the child may be removed; if it is to follow his person. His religious principles I look at it certainly in rather a larger view; considering them in some degree connected with his political principles; for though I think it very improper, that Magistrates should make use of an Act of State, enabling the Government to send aliens out of the kingdom, as an instrument in family disputes, it is impossible to deny, that the religious principles of men have a very strong connection with their political principles, and lead to acts, against which these laws as to aliens were directly levelled; and an attempt has been seldom made for the destruction of a country by propagating *Jacobinical* Principles (a term, which, I agree with Mr. Romilly, has been frequently applied to principles, to which it is not applicable), that has not been preceded by an attempt to root out those religious principles, which are perhaps the best guard of sound political principles.

If a clear, distinct, case was made, of an alien coming here, living under the protection of the State, and using his residence here for the purpose of propagating principles so detestable as those, of which these affidavits speak, that may very properly call the attention of those, who are to execute the Alien Act. But I must look at it only with reference to the probability of the infant's being removed, or left in this country; attending also to the way, in which the child should be brought up. Since I have sat here, I removed a child from its father upon considerations such as these. The father was a person in constant habits of drunkenness and blasphemy, poisoning the mind of the infant; and I thought it not inconsistent with a due attention to parental authority, so abused, to call in the authority of the King, as *Parens Patriæ*. In this case the defendant was ill-advised as to the mode of taking away the child. A man has a right to the custody of the person of his wife; in general also to that of his child; but he must not pursue a legal object by illegal means;

as by force of arms, or a conspiracy to do it by force of arms; and though the object is most legitimate, he may become very criminal by the means used to attain it. But I can look to all these circumstances only as relating to the simple consideration, what is fit to be done with the person of the child. I am not to consider, whether the defendant is an alien, who ought to be left in this country; and must dismiss the strong testimony in his favour, as a peaceable man, except as it attaches upon the future fate of the infant. Neither can I discuss, what would be the fate an application by either party to the Ecclesiastical Court, or of an application to the Court of King's Bench, upon a *Habeas Corpus*, to obtain possession of her person. The single question is, whether this Court has jurisdiction against the legal, natural, right of the father to have the custody of the person of his child: the father as an alien born, but living in this country under its protection, at least; if, as it is said, he has not since his marriage received the bounty of government, and born in a country at this moment in hostility with this country: a circumstance material, as affecting the probability of his return to France; and considering what must be the effect of his return, whether with the intention of becoming an enemy of this country, or not, upon the individual character, as bound up in the national character. He is an alien father of a child, a natural-born subject; upon whom, by birth, a duty of allegiance has attached, which it never can cast off in any country. There is no doubt, this child, if grown up, might by the prerogative, issuing the writ of *Ne exeat Regno*, be restrained from leaving the kingdom; not upon the principles, on which that writ is generally applied, but by a more correct application of it; and I conceive also, if the child was grown up, and the father had taken it away, the Crown might by the Great or Privy Seal, call upon it to return; and, if not obeyed, might take its property.

The next consideration is, whether the Court has jurisdiction in what cases, and to what extent, to control the right of the father, *primâ facie*, to the person of the child. In whatever principle that right is founded, it is unquestionably established, and is not disputed. I know there is a very learned opinion of Mr. Hargreave[1] as to the jurisdiction of the Court

[1] Mr. Hargreave's Note 70. Co. Lit. 89. a.

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upon this point; and a very able note by Mr. Fonblanque [1] in answer to it; who has stated the principle very correctly: for in *Butler* v. *Freeman* [2] Lord Hardwicke, professing not to go upon guardianship, and disclaiming wardship, puts it upon this; that the Court represents the King, as *Parens Patriæ*. That has been followed in many cases, and was clearly the principle of Lord Thurlow in *Powell* v. *Cleaver*,[3] *Cruse* v. *Hunter*[4] and *Ex parte Warner*.[5] In the first of those cases it was contended, that the bounty given to the father had put him to his election, and he could not, after receiving that legacy, withhold compliance with the condition for the education of his children. That argument could not sustain the jurisdiction. The father, not knowing, that he was making the election, was at full liberty to pay back the money. But Lord Thurlow's opinion went upon this; that the law imposed a duty upon parents; and in general gives them credit for ability and inclination to execute it. But that presumption, like all others, would fail in particular instances; and if an instance occurred, in which the father was unable, or unwilling, to execute that duty, and, farther, was actively proceeding against it, of necessity the State must place somewhere a superintending power over those, who cannot take care of themselves; and have not the benefit of that care, which is presumed to be generally effectual. In those cases there was a struggle between the feelings of the father and a due attention to the interest of the child; upon the condition, that his education should be conducted in the manner prescribed; which was the course of maintenance and education the best calculated to promote his happiness in the State, in which that fortune would place him. But Lord Thurlow took upon him the jurisdiction; on this ground, that he would not suffer the feelings of the parents to have effect against that duty, which upon a tender, just, and legitimate, deliberation the parent owed to the true interests of the child; and his Lordship separated the person of the child from the father; always taking care, that the separation shall not have a greater effect than the case requires; and that the intercourse

[1] 2 Fonb. Tr. Eq., 224 Note (*a*).
[2] Amb., 301.
[3] 2 Br. C. C., 499.
[4] In Chancery, Sit. after T. T. 1790.
[5] 4 B. R. C. C., 101.

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shall be as frequent and full as the case, requiring the separation, will permit.

Then, if there is a jurisdiction, under what circumstances is it to be exercised? In the situation of this child it is extremely difficult not to interpose; and it is also extremely difficult to say, how the Court is to interpose. Looking at the father's situation, and taking his own representation as to his inclination with regard to this child, upon the affidavits, there is a fair suspicion of real danger, that the child may be removed out of this country; and, then, according to Lord Macclesfield's opinion in the *Shaftsbury Case*,[1] the Court must act upon that suspicion. Same method must be taken to secure to the Court, that the person of the child shall remain in this country. As to the specific means, I do not recollect, that the Court has directly gone farther than an order, restraining a person from removing the child out of its jurisdiction. But the Court may according to its habits and principles find means indirectly of securing that object. It must be considered, what the Court is to do, if the father will, and, if he will not, give security not to remove the child; and, if security can be given, whether the child, regard being had to both claims, is to remain in the custody of the father, or, on account of its very tender age, in that of the mother, or some friend; or, whether the Master shall say, in what manner it should be disposed of. It is clear, the father must be restrained from taking the child out of the country. I must either give the child to the father; when I know what he proposes to do, if it remains with him; or to the mother; to which upon some principles there is great objection: or I must take some middle course; and I shall take care, that the intercourse of both father and mother with the child, as far as is consistent with its happiness, shall be unrestrained.

[1] *Eyre* v. *The Countess Shaftsbury*, 2 P. Will., 102.

CHARLOTTE ABRAHAM

v.

FRANCIS ABRAHAM.[1]

[*Reported in 9 Moo. I.A., 195.*]

1863.
June, 13.

Their Lordships' judgment was delivered by

THE RIGHT HON. LORD KINGSDOWN.—The appellants in the case are Charlotte Abraham, the widow, and Daniel Vincent Abraham, the only surviving child of Matthew Abraham. The respondent, Francis Abraham, was the only brother of the late Matthew Abraham. Matthew Abraham and the respondent were by birth Hindoos of pure native blood, being descended from a family of Hindoos. Their ancestors for several generations had embraced Christianity, and they were themselves Christians, originally it appears Roman Catholics, afterwards Protestant Dissenters, and subsequently members of the Church of England. They were of the class known in India as "native Christians." Matthew Abraham was by far the elder of the two brothers; for in early life, when the respondent was only about two or three years old, he was employed as a clerk in the arsenal at Bellary. In the year 1820, he married the appellant, Charlotte Abraham. This lady and her father and mother were also Christians; the father an Englishman and the mother a Portuguese. They were of the class known in India as "East Indians." There was issue of this marriage the appellant, Daniel Vincent Abraham, and another son, Charles Henry Abraham, who survived his father, Matthew Abraham, but died pending the proceedings brought before us by this appeal. In the year 1823, Matthew Abraham established a shop at Bellery, the business of which was continued to be carried on up to the time of his decease. Throughout these proceedings it is called the shop-business. In the year 1827, Matthew Abraham entered into a contract

[1] *Present*:—Members of the *Judicial Committee*,—The Right Hon. LORD KINGSDOWN, the Right Hon. the LORD JUSTICE KNIGHT BRUCE, the Right Hon. the LORD JUSTICE TURNER, and the Right Hon. SIR JOHN TAYLOR COLERIDGE.

Assessors:—The Right Hon. SIR LAWRENCE PEEL, and the Right Hon. SIR JAMES W. COLVILE.

with Government for the supply of liquors to the troops at Bellary, and erected a distillery for the purposes of this contract. The contract was renewable annually, and was annually renewed to Matthew Abraham up to the time of his decease, except in one year when it fell into other hands. Throughout these proceedings it is called the *Abkarry* contract. In the year 1832, Matthew Abraham took Mr. Richardson and the respondent, his brother, into partnership with him in the shop-business, each party taking a third of the profits. This partnership was dissolved in the year 1837, and the business was thenceforth, until the death of Matthew Abraham, continued by him and the respondent, his brother, without any new arrangement having been come to between them. The respondent, some time before the death of Matthew Abraham, also married a Christian lady of the class known as "East Indians." In the year 1842, Matthew Abraham died, living the appellants and Charles Henry Abraham, his widow and children. After his death the respondent continued to carry on the shop-business, and he also procured the *Abkarry* contract to be annually renewed in his name, and carried on the business of that contract, and the distillery connected with it. In the year 1854, the appellants and Charles Henry Abraham instituted against the respondent the suit out of which this appeal has arisen, estimating the property to be recovered in the suit at Rs. 3,00,000.

By their plaint in the suit they alleged, that the whole in the capital in the shop-business was supplied by the late Matthew Abraham; that the distillery business was carried on by him alone and with his own capital, and that the respondent was his clerk, agent, or manager, in this business at a salary; that on the death of Matthew Abraham, the duty of collecting his estate devolved on the appellant, Charlotte Abraham, and she intrusted the collection, realization, and management of it to the respondent, and gave him a power of attorney for that purpose, and that the respondent had carried on both the shop-business and the distillery business by means of the late Matthew Abraham's capital; that he had made payments to and on account of the plaintiffs, and for the debts of Matthew Abraham, but not nearly to the amount which he had received; and the plaintiffs, accordingly by their plaint, prayed for an account of the late Matthew Abraham's estate received by the respondent, including the

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profits of the shop-business and of the distillery, subsequently to his decease, offering to make the respondent a just and sufficient allowance for his services in managing the distillery business since the death of Matthew Abraham.

The respondent, by his answer to the plaint, insisted, that the appellant, Charlotte Abraham, being the widow of the late Matthew Abraham, could not claim jointly with her sons, the other plaintiffs; that she was entitled only to maintenance, and must seek it from her sons. He said that Matthew Abraham's situation in the arsenal was procured for him by his father; that the father demised when he, the defendant, was about two or three years of age, and that the late Matthew Abraham took charge of him, the defendant, as his guardian, and took charge also of all the property left by their father; that the shop-business had been conducted by him both in the life-time and since the decease of Matthew Abraham, but that as the deceased Matthew Abraham and he (the defendant) were possessed of very little property, they had jointly borrowed money at interest on their joint bonds to carry on their business, and that it was by these means the capital of the business had been raised; and he urged that the late Matthew Abraham and he (the defendant) were brothers of an undivided native Hindoo family, jointly labouring together for their common welfare, borrowing money on interest for their business upon their joint bonds and security, and mortgaging all their joint property of every description as security for the same; and consequently that the late Matthew Abraham and he (the defendant) had an equal right to all the capital, and not the elder brother, Matthew Abraham, alone. He said that the plaintiffs, Charles Henry Abraham and Daniel Vincent Abraham, were merely junior members of an undivided Hindoo family, and that he (the defendant) by the death of Matthew Abraham had become the head of the family, and he insisted that the fact of himself and his father and family being Christians could not and did not make them subject to the English law. That their religion was an accident, and that in fact they were Hindoos and undivided, and must of necessity, and according to all practice and precedent, be subject to the Hindoo law and no other. He denied that the *Abkarry* contract was the property of Matthew Abraham alone, and alleged that he (the defendant) had purchased the contract

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after the death of the late Matthew Abraham on his own responsibility.

The plaintiffs by their replication submitted, that by whatever law the case was to be decided, they had all a common interest against the defendant, and that no final decision could be come to in the absence of any of them. They relied upon the family having been Christians for several generations as putting an end to the defendant's assertion that the case ought to be decided according to the Hindoo law; and after referring to the class of East Indians having always been considered to be governed by the same laws as Englishmen as to their rights of descent and inheritance, and to authorities by which, as they contended, it was shown that in suits between parties who were neither Hindoos nor Mahomedans in religion, the usages of the particular class to which they belonged formed the guide of the Court, and that even in cases to which Hindoo law was applicable, the usages of the family were to be the rule of guidance when they were opposed to the law, they submitted that the Court, before coming to a decision in the case, ought to consult the usages of the class to which the parties in the suit belonged, and ascertain what had been the usages of the family in which they had been reared. They further insisted, that even if the case was to be governed by the Hindoo law, the defendant had no right to any portion of the late Matthew Abraham's estate. They denied that Matthew Abraham inherited any property whatever from his father, and said that the father died an insolvent and ruined man, and that Matthew Abraham had taken charge of the defendant and reared him from generosity, and had begun the affairs under litigation when the defendant was a boy at school, and unable to assist him in them. They insisted that Matthew Abraham and the defendant were not members of an undivided family in the light alleged by the defendant, and that even if Matthew Abraham obtained his original appointment under Government through the instrumentality of his father, it would confer no right on a younger brother, but the salary attached to the appointment would, even under the Hindoo law, be considered a separate acquisition.

The defendant, by his rejoinder adopted the view insisted upon by the replication as to the principles which ought to determine the law by which the case should be decided,

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submitting that the plaintiffs had laid down the correct principle, namely, that the customs and usages of the class to which both parties belonged must be sought for and searched, and, further, that the usages of the particular family to which the parties belonged must be looked to, in order to ascertain what law was to govern their relations to each other.

It appears from the record of proceedings before us that in this stage of the suit the plaintiffs were non-suited by a decree of the Civil Court of Bellary upon the grounds, first, that the plaintiff, Charlotte Abraham, the widow, could not take part in the suit, she having no right of inheritance as the family stood; and, secondly, that no sufficient description or specification of the value of the property sued for had been given in the plaint: but upon an appeal to the *Sudder Adawlut*, this non-suit was set aside, and the Civil Judge was directed to dispose of the case on the merits, the Court observing, that the Civil Judge had pronounced upon a point material to the issue of the suit, namely, the law of inheritance, by which the parties were to be bound, without receiving any evidence whereby to govern his judgment on the subject, and that such a judgment could only be rightly pronounced upon a consideration of the usages of persons situated as the parties were, being Christians whose ancestors were of Hindoo stock, and of the usages in their particular family, as indicated by the acts of the parties and their predecessors in respect of their property since they had belonged to the Christian community, and that it would be necessary further to ascertain by whom and under what circumstances the property in issue was acquired, so as to determine whether it was the estate of the deceased, Matthew Abraham, acquired by himself, or of ancestral origin, after which the rights of the parties thereto, whether under the English or Hindoo law, should be declared.

The case was accordingly remitted to the Civil Court of Bellary, and the points stated in the pleadings[1] were recorded for proof. A vast mass of evidence upon the points recorded was adduced, both on the part of the plaintiffs and on the part of the defendant. Their Lordships do not find it necessary to enter into the details of this evidence. It will be sufficient for them, in disposing of the several points of the case, to state

[1] 9 Moo. I. A., p. 207.

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the conclusions at which they have arrived as to the result of the evidence bearing on these points.

By the decree made upon the hearing of the cause by the Civil Court of Bellary, the Court ordered as follows :—That an account be taken of the capital employed in the shop-business and of the profits thereof, both prior and subsequent to Matthew Abraham's death, and that the defendant do pay to the plaintiffs one-half of the capital and profits found due. That an account be taken of all the capital employed in the distillery business and of the profits, down to the time of the death of Matthew Abraham, and also of the profits of the distillery business arisen since his death, and that the defendant do pay to the plaintiffs the amount of the capital and profits found due. That an account be taken of all other, the moneys, goods, debts and property of Matthew Abraham which have been collected or received by, or come into the possession of, the defendant, or any person by his order or for his use, and that the defendant do deliver up to the plaintiffs all such portions thereof as consist in kind or species, and do pay to the plaintiffs all such portions thereof as consist of money, and do pay such portions thereof as have been converted into money since the death of Matthew Abraham. That so long as the present contract endures, and so long as the defendant carries on the business in the plaintiff's distillery buildings, etc., and with their capital, stock, etc., he must and shall be considered as their agent, and as such accountable to them for all the profits arising from the said business, and that he shall deliver up to the plaintiffs all deeds, books, securities, documents, papers, and writings in his possession or power, relating to the said contract or to the said distillery business, or otherwise relating to the property, estate, or effects of Matthew Abraham, deceased ; the plaintiffs being bound, in taking the aforesaid several accounts, to make to the defendant a just and sufficient allowance for his services in managing the said distillery business, and also for his services in collecting and managing all other, the property, estate and effects of Matthew Abraham, and that the defendant do pay to the plaintiffs the costs of the suit.

From this decree the defendant appealed to the *Sudder* Court.

The *Sudder* Court, upon the case being brought before it, submitted a question to their Pundits in these terms :—" Two brothers, governed by Hindoo law, inherit no ancestral property.

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They live together. The elder acqnires some proerty. The younger brother, as he comes to years of discretion, is subsequently admitted by the elder to take part in the administration of his business. They jointly borrow money for the uses of the business, and both give their labour thereto. The elder of those brothers has demised. During the latter years of the deceased brother the labour fell chiefly on the younger one. Since the demise it has fallen exclusively on him. The elder brother has left two sons. Are the said uncle and nephews to be considered co-sharers ; and, if so, in what proportions ?

And the Court afterwards submitted this further question to the same Pundits:—"Supposing the said two brothers and the sons of the deceased brother to be ignorant of their respective rights in law over the said property, would this interfere with the title of one party or the other to recover such right when disputes and consequent litigation occurred between them?"

The opinion given by the Pundits upon these questions having been, that the property ought to be divided into two shares, and one of them given to the sons of the elder brother and the other to the younger one, and that the rights acquired by the sons could not be affected by their ignorance of those rights, the Court as to the legal rights of the parties held that they stood as representing two branches of a family governed, as to rights in property, by Hindoo law, and with equal shares; and having arrived at this conclusion, the Court adopted the estimate of the value of the property made by the plaintiffs for the purposes of their suit—that it was of the value of Rs. 3,00,000, added to that amount the sums which had been paid to the plaintiffs and to creditors, and the value of some part of the property in the plaintiffs' possession, thus bringing up the entire value of the property to Rs. 4,71,114 10*a*. 5*p*., and taking one-half of that amount as the plaintiffs' share, and deducting from it the sums which had been paid to them, and one-half of the debts, found the balance due to the plaintiffs to be the sum of Rs. 71,492 10*a*. 9½*p*., which the Court ordered the defendant to pay to the plaintiffs in discharge of all obligations due by him up to the date of the suit. The Court was also of opinion that the plaintiffs were not justified in having recourse to the suit, and accordingly imposed upon them all the costs which had been incurred by it.

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It is from this decree of the *Sudder* Court that the present appeal has been brought.

The first and most important question raised by this appeal is, by what law the rights of these parties ought to be determined. In considering this question it is material in the first place to observe what was the real point in issue in the cause. Laying out of consideration the objection raised by the answer, that the plaintiff, Charlotte Abraham, as widow, could not sue jointly with the other plaintiffs, her sons, an objection of misjoinder of parties which, in their Lordships' opinion, was properly answered by the replication, and properly disposed of by the *Sudder* Court when the case was first brought before it by appeal, the true question at issue in this case is, not who was the heir of the late Matthew Abraham, but whether he and the respondent formed an undivided family in the sense which those words bear in the Hindoo law with reference to the acquisition, improvement, enjoyment, disposition, and devolution of property. It is a question of parcenership, and not of heirship. Heirship may be governed by the Hindoo law, or by any other law to which the ancestor may be subject; but parcenership, understood in the sense in which their Lordships here use the term, as expressing the rights and obligations growing out of the *status* of an undivided family, is the creature of, and must be governed by, the Hindoo law. Considering the case, then, with reference to parcenership, what is the position of a member of a Hindoo family who has become a convert to Christianity? He becomes, as their Lordships apprehend, at once severed from the family, and regarded by them as an outcast. The tie which bound the family together is, so far as he is concerned, not only loosened, but dissolved. The obligations consequent upon and connected with the tie must, as it seems to their Lordships, be dissolved with it. Parcenership may be put an end to by a severance effected by partition; it must, as their Lordships think, equally be put an end to by severance which the Hindoo law recognizes and creates. Their Lordships, therefore, are of opinion, that upon the conversion of a Hindoo to Christianity the Hindoo law ceases to have any continuing obligatory force upon the convert. He may renounce the old law by which he was bound, as he has renounced his old religion, or, if he thinks fit, he may abide

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by the old law, notwithstanding he has renounced the old religion.

It appears, indeed, both from the pleadings and from the points before referred to, that neither side contended for the continuing obligatory force of Hindoo law on a convert to Christianity from that persuasion. The custom and usages of families are alone appealed to, with a reference also to the usages of this particular family; a reference which implies that the general custom of a class is not imperatively obligatory on new converts to Christianity. The conclusion at which their Lordships have arrived on this point, appears also to be supported by authority; for the opinion expressed as to the Hindoo law by the Judge of the Civil Court at Bellary seems to coincide entirely with the opinions of Pundits reported in W. H. Macnaghten's "Hindu Law," Vol. II, pp. 131-32. It is there stated, that on the death of an apostate from the Hindoo faith, his heirs, according to Hindoo law, will take all the property which he had at the time of his conversion; and the marginal note states, that his subsequently-acquired property would be governed as to its devolution by the law of his new religion. The religion embraced in that case was the Mahomedan, which regulated the devolution of property. The Pundits, therefore, in their reply, naturally connected religion with the rules of descent of property as an adjunct, but the important point which they declare is the separation of the convert from the binding force of Hindoo law, as to his subsequent acquisitions.

Such, then, being the state of the case, so far as the Hindoo law is concerned, we must next consider whether there is any other law which determines the rights over the property of a Hindoo becoming a convert to Christianity. The *lex loci* Act clearly does not apply, the parties having ceased to be Hindoo in religion; and looking to the Regulations, their Lordships think that so far as they prescribe that the Hindoo law shall be applied to Hindoos and the Mahomedan law to Mahomedans, they must be understood to refer to Hindoos and Mahomedans not by birth merely, but by religion also. They think, therefore, that this case fell to be decided according to the Regulation which prescribes that the decision shall be according to equity and good conscience. Applying, then, this rate to the decision of the case, it seems to their Lordships that

the course which appears to have been pursued in India in these cases, and to have been adopted in the present case, of referring the decision to the usages of the class to which the convert may have attached himself, and of the family to which he may have belonged, has been most consonant both to equity and good conscience. The profession of Christianity releases the convert from the trammels of the Hindoo law, but it does not of necessity involve any change of the rights or relations of the convert in matters with which Christianity has no concern, such as his rights and interests in, and his powers over, property. The convert, though not bound as to such matters, either by the Hindoo law or by any other positive law, may by his course of conduct after his conversion have shown by what law he intended to be governed as to these matters. He may have done so either by attaching himself to a class which as to these matters has adopted and acted upon some particular law, or by having himself observed some family usage or custom; and nothing can surely be more just than that the rights and interests in his property, and his powers over it, should be governed by the law which he has adopted, or the rules which he has observed.

Their Lordships have thought it right thus to state their opinion on this point, as this is the first case in which the question has been brought under their consideration. They consider the decision referred to in the judgment of the *Sudder Dewanny Adawlut* in the case of a succession to one of the class of East Indians to be an instance of a just and proper exercise of the discretion entrusted to these Courts. The English law, as such, is not the law of those Courts. They have, properly speaking, no obligatory law of the *forum*, as the Supreme Courts had. The East Indians could not claim the English law as of right; but they were a class most nearly resembling the English, they conformed to them in religion, manners, and customs, and the English law as to the succession of movables was applied by the Courts in the *Mofussil* to the succession of the property of this class.

Such, then, being their Lordships' opinion as to the law by which they ought to be guided in the decision of this case, it becomes necessary to see how the case stands upon the evidence.

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Their Lordships collect from the evidence that the class known in India as "native Christians," using that term in its wide and extended sense as embracing all natives converted to Christianity, has subordinate divisions forming again distinct classes, of which some adhere to the Hindoo customs and usages as to property; others retain those customs and usages in a modified form; and others again have wholly abandoned those customs and usages, and adopted different rules and laws as to their property.

Of this latter class are the "East Indians," a class well defined in India, the members of which follow in all things the usages and customs of the English resident there, and though they cannot claim the exemption from jurisdiction, nor the privilege of a personal law, which the British subjects, in the limited sense of the terms of the jurisdiction of the Charters of the Supreme Courts, enjoy, in other respects, in the common bond of union in religion, customs, and manners, approach the class of British subjects.

Reverting again to the evidence, their Lordships think that it is to be collected from it that the family from which both the late Matthew Abraham and the respondent descended was of that class of native Christians which commonly retains native usages and customs, and they consider it probable, therefore, that had the family possessed property they would, so long as those usages and customs were retained, have enjoyed it in common according to Hindoo custom; but their Lordships are perfectly satisfied upon the evidence that the late Matthew Abraham and the respondent had no ancestral property, and that the property which the late Matthew Abraham had was acquired by him by his own sole unaided exertions, and without any use whatever of any common stock. They fully concur in the finding of both the Courts in India upon this point. They are also quite satisfied upon the evidence that from the time of the late Matthew Abraham's marriage he and the appellant, Charlotte, his wife, and their children adhered in all respects to the religion, manners, and habits of the East Indians, the class to which the appellant, Charlotte Abraham belonged.

Previously to the marriage some doubt appears to have been entertained whether the East Indians, the class to which the lady belonged, would receive Matthew Abraham into their society and treat him as one of themselves. The evidence on this point

of the appellant, Charlotte Abraham, the first plaintiff, is corroborated by that of a very respectable witness, on whose veracity no doubt can rest. Before this time Mr. Matthew Abraham had assumed the English dress, and had outwardly conformed to all the habits of the English. Assurances were given that the East Indians of Bellary would recognize her husband as one of their body, and the marriage took place. On one important public occasion when a jury was summoned of East Indians, Matthew sat as one of them, and acted as their foreman.

The evidence on this part of the case appears to their Lordships to be clear beyond all doubt. They proceed, then, to consider its effect. That it is not competent to parties to create, as to property, any new law to regulate the succession to it *ab intestato*, their Lordships entertain no doubt; but that is not the question on which this case depends. The question is, whether, when there are different laws as to property applying to different classes, parties ought not to be considered to have adopted the law as to property, whether in respect of succession *ab intestato* or in other respects, of the class to which they belong. In this particular case the question is, whether the property was bound by the Hindoo law of partnership.

Now, Matthew Abraham acquired the nucleus of his property himself. No law imposed any fetter upon him as to his mode of dealing with it. It is not even shown, as a fact, how his ancestors after their conversion dealt with such property, as to the use and enjoyment of it. It is plain that no rule as to such use and enjoyment, which the ancestors may voluntarily have imposed on themselves, could be of compulsory obligation on a descendant of theirs acquiring his own wealth. If a Hindoo in an undivided family may keep his own sole acquisitions separate, as he undoubtedly may, *a fortiori* a Christian may do the same. Customs and usages as to dealing with property, unless their continuance be enjoined by law, as they are adopted voluntarily, so they may be changed, or lost by desuetude. It was well observed by Mr. Melvill, that custom implies continuance. If a family of converts retain the customs in part of their unconverted predecessors, is that election of theirs invariable and inflexible? Can neither they nor their descendants change things in their very nature variable, as dependent on the changeful inclinations, feelings, and

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obligations of successive generations of men? If the spirit of an adopted religion improves those who become converts to it, and they reject, from conscience, customs to which their first converted ancestors adhered, must the abandoned usages be treated by a sort of *fictio juris* as still the enduring customs of the family? If it be not so as to things which belong to the jurisdiction of conscience, is it so as to things of convenience or interest? Surely, in things indifferent in themselves, the Tribunals which have a discretion and have no positive *lex fori* imposed on them should rather proceed on what actually exists than on what has existed, and informing their own presumptions have regard rather to a man's own way of life than to that of his predecessors. Though race and blood are independent of volition, usage is not.

The law has not, so far as their Lordships can see, prohibited a Christian convert from changing his class. The inconvenience resulting from a change of succession consequent on a change of class is no greater than that which often results from a change of domicile. The *argumentum ab inconvenienti* cannot, therefore, be used against the legality of such a change. If such change takes place in fact, why should it be regarded as non-existing in law? Their Lordships are of opinion, that it was competent to Matthew Abraham, though himself both by origin and actually in his youth a "native Christian," following the Hindoo laws and customs on matters relating te property, to change his class of Christian, and become of the Christian class to which his wife belonged. This was no light and inconsiderate step, taken up on a whim, and to be as lightly laid aside. We find in the evidence that there was on one side an exhibition of preliminary caution. The change was deliberate, it was publicly acted upon, and endured through his life for twenty years or more. His family was managed and lived in all respects like an East Indian family. In such a family the undivided family union in the sense before-mentioned is unknown. How, then, can it be imposed on that family of which Matthew Abraham formed the head as father? Not by consent, for there was none; not by force of obligatory law, for there was none; not by adoption, for they had not adopted any Hindoo customs, but, on the contrary, had rejected them all. It could only be imposed, as it seems to their Lordships, by passing over the actual family

springing from the marriage, and by absorbing all its members in the original family of which the two brothers were members; by passing over all actual usages, customs, and ways of living; and by supposing, contrary to fact, the prevalence of Hindoo customs which had been deliberately abandoned. Their Lordships, therefore, are of opinion, that the undivided family on which the defendant relies in his answer did not exist in any sense which is material to or assists the decision of the case.

There being, then, in their Lordships' opinion, no such undivided family, and the case not being, in their judgment, governed by the Hindoo law, it is unnecessary to discuss the opinion given by the Pundits upon the operation of that law, or to enter into the question, so much discussed at the Bar, whether the late Matthew Abraham's acquisitions ought, or ought not, according to that law, to have been deemed to be his separate estate. It is sufficient, with reference to the opinion of the Pundits, to say, that the case stated for their opinion proceeds upon an assumption which, in their Lordships' judgment, was not warranted by the facts. Their Lordships, however, think it right to add, for the guidance of the Courts in India in future cases, that whenever the opinion of Pundits is required, and there are any special circumstances which may bear upon the question to be submitted for their opinion, those special circumstances ought to be set forth in the case submitted to them. Their Lordships make this observation with reference to the broad and general statements contained in the case which, in this instance, was laid before the Pundits; "that the brothers lived together, and that the eldest acquired some property," unaccompanied as those statements were by any specification of the mode in which, and the circumstances under which, the brothers so lived, and the property was so acquired—circumstances which, to say the least, were important to be considered in forming an opinion upon the point submitted for consideration.

Having thus considered the case so far as respects the law to be applied in determining it, their Lordships will now proceed to consider how the case stands upon the evidence with reference to the point whether the defendant was entitled to share in the property in question by agreement, or consent amounting to agreement, between him and the late Matthew

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In considering the weight of the evidence upon this point, the first thing to be determined is, upon whom does the burthen of proof rest? Their Lordships are of opinion, that it lies on the defendant. It must be so, even under the Hindoo law, as the nucleus of acquired property was in this case separate, unaided acquisition, unaided either by funds or labour of the claimant. Their Lordships do not propose to enter into a minute examination and consideration in detail of every part of the evidence relied upon, nor of every observation made and argument urged upon it by either side: that course would extend their observations to an unnecessary and unprofitable length. They propose to deal with the presumptions insisted on, on either side, as arising from the conduct of the parties, and to contrast and weigh those presumptions. The case was rightly stated by Mr. Mackeson to be, not a one-side one; on the contrary, it presents evidence embarrassing to deal with, both in the conflict of positive testimony and of opposing presumptions. For the appellants, the presumptions from conduct principally relied on are those which arise from what appears upon the evidence as to the following matters; first, the habits of life of the families both of Matthew Abraham and the respondent, as inconsistent with the nature of the existence of an undivided Hindoo family, Hindoos by origin, but not Hindoos by religion. Secondly, the establishment by Matthew Abraham of a business under his sole name; his introduction into it of his brother and Richardson as partners with himself; his formal public notification of that fact to the world by a notice stating that he had introduced them into his firm; the payment of rent for the shop, both during the continuance of that firm and by the succeeding firm, which then consisted of himself and his brother only; and the inconsistency of that payment with the joint property in the building and premises. Thirdly, the signatures on several occasions of Francis Abraham as agent; his dissatisfaction with the business at Kurnoul; and his language regarding it as inconsistent with a joint ownership and corresponding voice. Fourthly, after the death of Matthew Abraham, the inconsistency of the defendant's whole

conduct for a time, with any notion in his mind that he had a joint legal interest in the whole property of the family. Much stress was laid on the inconsistency of the statement in the respondent's letter to Charles Henry Abraham, of the 19th of August, 1842, in which, giving an account of all the property of Matthew Abraham, he states that it was in the bracketed item or items alone he had a half share, the item or items so bracketed not including the distillery, which is afterwards mentioned as a part of the property of Matthew Abraham; on the respondent's fears expressed in the same letter of being left to seek his fortune; on his expression that he had hoped that his brother would have provided for him; and on the request to Charles Henry Abraham, to intercede with his mother to carry out the presumed intentions of his father. Fifthly, the treatment by the defendant of Mrs. Charlotte Abraham, as the head of the family; the inconsistency of that treatment with her condition of a widow in a family adopting or retaining Hindoo customs and law in part and by choice; the administration taken out in her name; and his taking a power of attorney from her. These were treated as inconsistent with the respondent's position in the family on his hypothesis.

On the other side, the nature of the original family to which the defendant and his brother belonged; the customs of the Christian class within which that family was included; and the ordinary enjoyment of their property by such families according to the customs of their Hindoo progenitors, were relied on to show that the family dealt with the property as an undivided one.

The dealings of the defendant in the management of his brother's affairs; the absence of any satisfactory proof that he had received any salary or emolument as agent or clerk; the consistency of all that he did with the ordinary course of dealing in an undivided Hindoo family; the presumed continuance of a state proved to have existed, and not in terms proved to have been interrupted; the execution of the bonds and conveyances referred to in the respondent's case; and the inconsistency of those instruments with the ordinary dealing of a mere clerk or agent,—were pressed with much force on the attention of their Lordships. The statement of ownership in Francis Abraham contained in his mortgage deed, and the admissions derived from the acts of the third plaintiff, Daniel Vincent Abraham, in the suits and

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proceedings relating to the Kurnoul affairs, also referred to in the case of the respondents, were urged as additional grounds in support of the case of the defendant, which it was argued the language of a large portion of the correspondence strengthened.

Their Lordships will first consider the evidence on these points, and the presumptions to be drawn from it with reference to the Hindoo law. In this point of view much, if not the whole, of what is urged on the part of the respondent as to the nature of the original family to which he and Matthew Abraham belonged, and as to the dealings of such families, is sufficiently answered by what has been already said as to the right of Matthew Abraham to change, and as to the fact of his having changed, the class of Christians to which he was attached. As to the absence of proof that the respondent received any salary or emolument as agent or clerk, independently of the absence and destruction of books and accounts, which cannot but weigh heavily against the respondent, it is to be observed that there is an equal absence of proof that the respondent ever received any share of profits as parcener.

The arguments from the dealings of the brothers, so forcibly urged by Sir Hugh Cairns, are certainly as forcible to prove an ordinary partnership as to prove that kind of parcenary which obtains under the Hindoo law. These brothers, when they established a partnership in the shop, established and maintained it on the ordinary commercial basis, in shares, as well when they were the only partners as when Richardson was associated with them. On what ground, then, should a Court conclude, if it thought that a conjoint interest existed in the *Abkarry* contracts, that it was founded on Hindoo family union, rather than on the model of the shop-business? This presumption could only be made by assuming the Hindoo law to govern the case.

As to the bonds and conveyances, it is to be observed, that these instruments are wholly unexplained by the evidence, and that the fact of the appellant, Charlotte Abraham, having been made a party to some or one of them, renders it very difficult to deduce from any of them the inference for which the respondent has contended; but, what is, perhaps, of still greater importance is this, that there is no proof of the application of any of the moneys raised by these instruments to any other purposes than the purposes of the shop, and that the

respondent by his answer refers to these moneys having been raised for the purposes of the shop-business. With respect to the correspondence, their Lordships feel no doubt as to the conclusion to be drawn from it. After carefully perusing it, they have been unable to find anything at variance with the statement contained in the letter of the 19th of August, 1842, to which they have above referred. They find much, both in the correspondence and in the other documents, in proof in the cause which tends to confirm what is stated in that letter.

The respondent, by that letter, insists on no right. He merely suggests a similar remuneration to that which he had hoped to receive by way of testamentary gift from his deceased brother. Their Lordships are totally unable to reconcile this letter with the existence of the right since insisted on. After giving due weight to the arguments on both sides on its construction and meaning, they are unable to adopt that reading of it on which the counsel for the respondent have insisted. That construction is not, in their opinion, consistent with either the spirit of the composition, viewed as a whole, or with its language.

Then as to the admission contended to have been made by the appellant, Daniel Vincent Abraham. Neither the appellant, Charlotte Abraham, nor the late plaintiff, Charles Henry Abraham, is in any way proved to have been privy to, or cognizant of, this admission; the late plaintiff, Charles Henry Abraham, was absent in England at the time, and he never in any way adopted it. It is, no doubt, evidence against all the plaintiffs, but, in their Lordships' opinion, undue weight has been ascribed to it in the judgment of the *Sudder* Court. Whence had this young man of nineteen his knowledge that the family was undivided? It is a mixed and complex proposition of fact and law; and it supposes a *status* concerning which the respondent himself seems to have been long uncertain. Had he so understood his position at the time when he wrote the letter of the 19th of August, 1842; had he then considered that he was a half-sharer in the whole property, he could scarcely have expressed himself as he did in that letter. Yet to this admission of a youth, ignorant alike of law and business, a binding effect is given against all the plaintiffs on the record.

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Their Lordships are not prepared to follow the *Sudder* Court in the weight which they have given to this admission. Looking at the whole case, with reference to the Hindoo law, they are of opinion, that the claim of the respondent to a share of the property in dispute by virtue of that law cannot be supported, and they are not less satisfied that if the case be looked at with reference to the English law—a point of view, however, which, so far as the respondent is concerned, seems to them to be excluded by the pleadings in the cause—the evidence on the part of the respondent is insufficient, when weighed against the evidence on the other side, to establish a partnership according to that law. Their Lordships, therefore, have come to the conclusion, that the decree of the *Sudder* Court cannot be maintained; but, on the other hand, they are not prepared to go to the full length to which the Judge of the Civil Court of Bellary has gone by his decree. The respondent, no doubt, stood in a fiduciary position; though he may have been unconscious of the duty arising from his acts, he had, in effect, attorned to the appellant, Charlotte Abraham, by accepting a power of attorney from her. That character, and the acquisitions under it, should have been renounced before the respondent asserted an interest adverse to that of his constituent; such an assertion in one acting as agent is not prohibited on grounds of policy alone. It is in itself an unconscientious breach of duty to a principal. The Letters of administration were, indeed, taken out for a special object only; they were not strictly necessary, a certificate would have sufficed. But they were not of a limited character. There were assets in the local jurisdiction, and all parties concerned in interest were either consenting to, or subsequently ratified. the authority delegated by the Letters of administration. The administration related back to the death of Matthew Abraham; the possession of the whole property, therefore, from the time of his death must be ascribed to the first plaintiff, as the defendant acting under his power could not claim adversely.

Their Lordships are by no means disposed to infringe upon the wise and salutary rules which have been laid down as to the conduct of persons standing in confidential positions; but, on the other hand, they ehtirely agree with the *Sudder Dewanny Adawlut* in their estimate of the value of the respondent's services.

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The property in the *Abkarry* contract may, by reason of its special character, be said to have been in a great degree preserved to the family by him. The evidence shows that none of the plaintiffs were competent to the management of the concern. In all probability, but for the respondent, the contract would have been lost to the family. It is represented to have been the chief source of their income. It differs materially from an ordinary trading partnership. The selection of the contractor is influenced by considerations which might probably have caused the respondent to be named as the successor to his brother in the contract. The relationship of the respondent to the family, the devotion of his time and labour to the augmentation of its wealth, the creation, as it were, of the profits of the *Abkarry* business, establish a great difference between this and the case of any ordinary agency.

In ordinary cases and under ordinary circumstances, these services on the part of the respondent would, no doubt, be sufficiently compensated by the provision in that behalf contained in the decree of the Civil Court, but in this case their Lordships find it proved by the plaintiff's first witness, that the respondent on Matthew Abraham's death declared to him that he had worked like a slave in the *Abkarry* business, and was merely paid for his labour; but that for the future he would not do so unless he received an equal share with the others, meaning his brother's widow and two sons; and the witness says that he soon afterwards mentioned this conversation to the widow. If the widow dissented from this view, she ought, as their Lordships think, to have communicated such dissent to the respondent, but she never did so. After her having so long availed herself of the respondent's services, which she knew to be rendered on the faith of his receiving one-half the profits as a remuneration for those services, she and the other parties interested in the estate could not, in their Lordships' opinion, be justly entitled to dispute the right of the respondent to be remunerated to that extent. Their Lordships, therefore, think, that it ought to have been declared by the decree that the respondent was entitled to an equal share of the profits of the *Abkarry* contract accrued after the death of Matthew Abraham as a remuneration for his services in the execution of that contract. Their Lordships think also that, having regard to the evidence to which they have last

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alluded, and to the respondent having been permitted for so many years to carry on the *Abkarry* contracts without any dissent having been expressed to the terms stipulated for by him, the decree of the Civil Court has not dealt properly with the question of costs. They are of opinion that, under the circumstances of the case, the costs, up to the hearing, ought not to have been given against the respondent by the decree, but ought to have been reserved until the accounts were taken. The benefit which may result to the estate may form a material ingredient in considering what ought ultimately to be done as to the costs, and the mode in which the respondent may account under the decree may also influence that question. The decree of the Civil Court having thus, in their Lordships' opinion, gone too far, their Lordships think that there should be no costs of the appeal to the *Sudder* Court or of this appeal.

Their Lordships, therefore, will humbly recommend Her Majesty to reverse the decree of the *Sudder* Court, and to restore the decree of the Civil Court of Bellary, modified as above pointed out[1].

NOTE.

"Upon the conversion of a Hindu to another religion, the Hindu law ceases to have any continuing obligatory force upon the convert. He may renounce the old law by which he was bound, as he has renounced his old religion, or if, he thinks fit, he may abide by the old law notwithstanding he renounces his old religion." The latter part of the rule laid down in the above passage must be understood to apply only to cases where the conversion has taken place to a religion which does not impose along with it an obligation to submit to a particular form of law, or where is no law defined by statute to govern the case of such converts. (See *Jowala Baksh* v. *Dharam Singh*, 10 Moo. I. A., 511, 537.) Succession to the property of a Hindu convert to Christianity will now be governed by the Indian Succession Act. (Act X of 1865.)

[1] See *Verden Seth Sam* v. *Luckpathy Royjee Lallah*, 9 Moo. I. A., 303.